Supreme Court of the United States

OCTOBER TERM, 1965

No. 440

UNITED STATES, PETITIONER

vs.

UTAH CONSTRUCTION AND MINING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 3-61

UTAH CONSTRUCTION AND MINING COMPANY, PLAINTIFF

vs.

THE UNITED STATES, DEFENDANT

PETITION—Filed January 6, 1961

1. Plaintiff, Utah Construction and Mining Company, formerly and during the times herein-mentioned known as Utah Construction Company, is, and at all times herein pertinent was, a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business in the City and County of San Francisco, State of California, now being located at 550 California Street in said City and County.

2. On March 19, 1953, pursuant to competitive unit price and lump-sum bids, plaintiffs was awarded and entered into a contract with the defendant, acting by and through the United States Atomic Energy Commission, designated Contract No. AT(10-1)-645, under which plain-
[fol.2] tiff was to furnish the plant, equipment, labor and materials and to perform the work, except as hereinafter alleged, for the construction of a large assembly and maintenance area at the defendant's National Reactor Testing Station in Jefferson and Butte Counties, Idaho. A copy of the contract, together with Advance Notice, Invitation No. AT(10-1)-645, Instructions to Bidders, plaintiff's bid, general conditions, special conditions, and pertinent drawings, schedules, specifications, addenda and modifications are annexed hereto as Exhibit "A" and by this reference made a part hereof.

3. In estimating its cost of the performance of the work set forth in the plans and specifications, and the

addenda thereto, of said contract, and in submitting its bid and entering into said contract for the performance of such work, plaintiff relied on defendant's express and implied representations and warranties that:

(a) all work could be completed, at the latest, within approximately one calendar year from the award of said contract, or specifically, by March 30, 1954;

(b) all equipment and materials to be furnished by defendant for the completion of said contract would be supplied to plaintiff completely designated, tested, inspected, and in a fit condition for installation or use at the respective times necessary to meet work schedules, and in the ordinary and economical course of the performance of said contract, and in accordance with the plans and specifications of said contract;

(c) all specifications and plans, shop drawings and models would be furnished at the respective times neces- [fol. 3] sary to meet the work schedules, and in the ordinary and economical course of the performance of said contract;

(d) any and all decisions pertinent to changes or material alterations of the required performance under said contract would be made in a reasonable and prompt manner, so as not to interfere unduly with plaintiff's work on said project, or to interfere with or preclude the ordinary and economic course of the performance of said contract;

(e) all plans and specifications, addenda thereto, and modifications under said contract were intended and prepared to produce a desired end-result, and were complete and adequate to produce such desired end-result;

(f) all the information in defendant's possession and within its special knowledge concerning the conditions of the job-site, and the materials and equipment to be furnished by defendant was disclosed to all bidders, including plaintiff;

(g) the plans and specifications prepared by defendant were complete, and not such as to mislead as to any item of work covered by said contract;

(h) defendant would not cause plaintiff any delay in the prosecution of its work, or protract the period of perform-

ance, or interfere in the performance of its work under said control; and

(i) defendant would not make unreasonable, arbitrary or excessive inspection demands, or arbitrarily or unreasonably reject any of plaintiff's completed work, or unduly delay in approving completed phases of said contract.

[fol. 4] 4. Plaintiff promptly commenced the performance of the contract work after receipt of defendant's Notice to Proceed, dated March 19, 1953, and during the entire period of such performance under said contract, defendant failed to perform in accordance with said contract, and its express and implied warranties and representations; specifically, defendant did not formulate a desired end-result prior to its Invitation to Bidders; defendant did not prepare adequate plans and specifications for the desired end-result represented to plaintiff in said contract, or for any end-result; defendant did not furnish plans and specifications, shop-drawings, models, equipment or materials in a timely manner, or in accordance with work schedules, or in the ordinary and economical course of the performance of said contract; defendant did not furnish equipment or materials to plaintiff completely designed, tested or inspected or in a condition fit for its intended use; defendant did not disclose to plaintiff all of its information concerning known job-site conditions and government-furnished equipment and materials; defendant did not make prompt or reasonable decisions with respect to changes and material alterations of said contract; defendant interfered with and unnecessarily delayed plaintiff in the prosecution of its work under said contract; defendant arbitrarily, unreasonably and excessively demanded inspection of both plaintiff's work in progress and its completed work; defendant arbitrarily and unreasonably rejected plaintiff's work in progress and its completed work; defendant unreasonably and arbitrarily delayed approval of plaintiff's completed work on said proj-

[fol. 5] ect; and defendant intentionally misrepresented to plaintiff that the contemplated work under said contract, or subjectively contemplated by defendant, or the desired end-result under said contract, or any end-result, could be completed or produced within one calendar year.

5. As a result of defendant's said misrepresentations and failure to perform in accordance with said contract and its implied and express warranties, plaintiff did not complete its work on said project and under said contract, the subsequent modifications and the change orders, numbering one-hundred thirty-six (136) in all, until on or about January 7, 1955. All of plaintiff's work required by defendant on said project was completed within the contract time as extended by defendant.

6. As a result of plaintiff's detrimental reliance on said defendant's delays, misrepresentations and failures to perform in accordance with said contract and its implied and express warranties, including, but not limited to, the acts of defendant with respect to major phases of said contract, hereinafter referred to, which independently and cumulatively constituted a breach of contract by defendant (subparagraphs 7(a), (b), (c), (d) and (e) herein), plaintiff was obliged to pay increased excavation costs in the amount of $17,734.63, added shield door costs in the amount of $4,457.24, increased concrete finishing costs in the amount of $109,356.00, added winter protection costs in the amount of $183,431.46, added administrative, overhead and equipment costs in the amount of $216,717.63, added labor costs in the amount of $79,844.18, and added excessive inspection costs in the amount of $55,000.00. None of the additional costs referred to herein would [fol. 6] have been incurred by plaintiff except for said failures of defendant to perform in accordance with said contract, representations and implied and express warranties.

7. The delayed completion date of said contract, and the increased costs to plaintiff herein referred to were due in large part, but not limited to, the following acts of defendant on the following specific phases of said contract:

(a) *Pier Drilling*—Included in plaintiff's contract with defendant, Exhibit "A" hereto, was the drilling and excavation for "piers" or foundation shafts for certain buildings to be constructed by plaintiff. In drilling the shafts for the piers, plaintiff's subcontractor encountered, on or about June 1, 1953, conditions differing materially

from those indicated in the contract documents, namely, "float rock" (individual rocks of various sizes, detached from the principal bedrock by glacial or geological action and subsequently covered by silt suspending such rocks below the surface of the ground). Such changed conditions delayed excavation procedures to such an extent that plaintiff was forced to protect and perform subsequent concrete work in inclement winter weather.

On or about February 18, 1955, plaintiff claimed additional compensation in the amount of $17,734,63 for the extra costs of drilling said "float rock". Defendant denied said claim on April 1, 1955. On or about March 31, 1955, plaintiff claimed additional compensation in the amount of $83,431.46 and a time extension of eleven months for additional costs to cover winter protection and performance resulting from the delayed excavation. Defendant denied said claim on April 19, 1955.

[fol. 7] On or about April 27, 1955, plaintiff appealed from the above decisions to the Atomic Energy Commission's Advisory Board on Contract Appeals, which found that (1) the "float rock" encountered constituted a "changed condition" within the meaning of Article 4 of said contract, that (2) this condition caused some delay in the drilling operation, (3) that no additional cost to plaintiff resulted from such changed condition, except insofar as plantiff was liable over to its drilling subcontractor (for which the Board recommended that the matter be remanded to the Contracting Officer to determine) and (4) that the excavation delay did not operate to delay the pouring of concrete because such latter delay was due primarily to a dispute over defendant's failure to furnish concrete aggregate of the quality specified in the contract and such aggregate dispute was not before the Board in the particular proceeding.

Defendant well knew, or should have known, of the actual subsurface soil conditions and did in fact mislead plaintiff and misrepresent such subsurface soil conditions. Further, defendant did find that some delay was attributable to the misleading specifications and misrepresentations prepared by defendant; however, defendant has not compensated plaintiff for any of its increased costs as a result thereof, namely (a) $17,934.63 for the additional

excavation work and for a fair and reasonable apportionment of the total increased costs for added winter protection in the amount of $183,431.46, (b) added administrative, overhead and equipment costs in the amount of $216,717.62, (c) added labor costs of $79,864.18, and (d) added [fol. 8] excessive inspection costs of $55,000.00 attributable to such delay and failure to perform, to which plaintiff is fully entitled. Plaintiff will ask leave of court to amend this petition when the precise amount of such apportionment has been determined.

(b) *Concrete Aggregate*—It was contemplated under said contract and the specifications, that plaintiff would pour approximately 18,000 cubic yards of concrete. On or about July 17, 1953, defendant suspended plaintiff's concrete mixing and pouring operations because of information received by its Contracting Officer on the project that the cement mixture being used was deficient in the strength requirements as specified by the contract (Section III, Division S-2). On or about July 21, 1953, defendant's Contracting Officer authorized resumption of work ". . . pending an investigation and determination of deficient strength requirements, . . ."

Subsequent tests revealed that the presence of small sands, or "fines" in the concrete aggregate furnished by defendant to plaintiff caused the deficient strength. Thereafter, defendant undertook, through another contractor, to clean the aggregate and remove such condition. Further, defendant authorized plaintiff, at defendant's cost, to increase the concrete mixture by one bag of cement, thereby increasing the mixture to six, instead of the originally specified five, bags of cement per cubic yard. Such added bag of cement provided the necessary strength, but increased plaintiff's finishing costs.

On or about July 19, 1956, plaintiff presented a claim to defendant's Contracting Officer in the amount of $109,[fol. 9] 356.00 for additional costs incurred by plaintiff due to defendant's failure to furnish aggregate to meet the specifications imposed by section S-2 as represented in SC-18 of Exhibit "A" hereto, on the grounds that such failure was a changed condition within the meaning of Article IV of said contract.

Said Contracting Officer denied said claim on the grounds that plaintiff's claim was for breach of contract or unliquidated damages and hence not within his jurisdiction. On appeal, Docket No. CA-121, Decision dated October 1, 1959, the Hearing Examiner upheld defendant's Contracting Officer and also ruled that plaintiff's claim was not timely within the framework of the contract and that said claim was not a changed condition within the meaning of Article IV.

Due to the delays caused by defendant's failure to furnish plaintiff with concrete aggregate in accordance with said plans and specifications, plaintiff was forced to pour cement in severe and inclement winter weather at greatly increased cost. Plaintiff incurred, and is entitled to be compensated by defendant for such added costs in the amount of $109,356.00 for extra finishing costs and for a fair and reasonable apportionment of the total increased costs of (a) added winter protection in the amount of $183,431.46, (b) added administrative, overhead and equipment costs in the amount of $216,717.63, (c) added labor costs in the amount of $79,844.18, and (d) added excessive inspection costs in the amount of $55,000.00 attributable to such delay and failure to perform. Plaintiff will ask leave of court to amend this petition when the [Vol. 10] precise amounts of such apportionment have been determined.

(c) *Shield Doors*—On or about May 12, 1953, plaintiff placed orders with certain vendors for various parts necessary to the completion of the shield door installation as required by the plans and specifications. In accordance with such plans and specifications, plaintiff submitted vendor's shop drawings to defendant on or about July 11, 1953 for the intended purpose of determining whether the proposed products were within the limits of contract specifications. Defendant determined that certain features not appearing on contract drawings should be added, namely, specific finish requirements, steel content, and specific arrangement and location of shield-door drive units.

Defendant's insistent imposition of additional design information and ultimate partial withdrawal and reversal of such action on October 26, 1953, delayed a firm commit-

ment to said vendors from July until November 3, 1953. Due to such delay on or about February 17, 1954, plaintiff was forced to postpone the pouring of concrete shield doors, as well as the necessary concrete on the buildings and structures affected thereby, until June, 1954, or a total of four months delay. Such delay in turn delayed all phases of work, including, but not limited to, the Shield Window and Amercoat Paint delays hereinafter referred to.

On or about October 29, 1955, defendant's Contracting Officer denied plaintiff's claim for extra work and delay resulting from defendant's inadequate plans, specifications and shop drawings with respect to shield doors. On or [fol. 11] about November 3, 1955, plaintiff appealed to the Atomic Energy Commission's Advisory Board on Contract Appeals. Said Board of Appeals, in Docket No. 95, Findings of Fact and Recommendations dated April 25, 1957, upheld said Contracting Officer's denial on the grounds that added costs of work arising from the necessity of completing inadequate design, plans, specifications or drawings were not "changes" within the meaning of Article III of said contract.

Plaintiff is entitled to recover from defendant all costs resulting from defendant's failure to furnish adequate and complete plans and specifications, as well as its failure to disclose all facts within its knowledge, namely, direct costs of extra work in the amount of $4,457.24 and a fair and reasonable apportionment of (a) added winter protection costs of $183,431.46, (b) added administrative, overhead and equipment costs of $216,717.63, (c) added labor costs of $79,844.18, and (d) added excessive inspection costs of $55,000.00 attributable to such delay and failure to perform. Plaintiff will ask leave of court to amend this petition when the precise amount of such apportionment has been determined.

(d) *Shield Windows*—Pursuant to a letter of intent issued by defendant to plaintiff in June, 1953, and Modifications No. 2 and No. 4 of Exhibit "A" hereto, plaintiff negotiated a contract with Corning Glass Works, under the general direction of defendant, for the procurement of shield windows, which were originally to be furnished

plaintiff by defendant for installation in the structure designated in said contract as Building No. 607. As the [fol. 12] result of defendant's insistence, the following language was inserted in plaintiff's contract with Corning Glass Works:

> (1) "All glass supplied will conform to the required specifications as tested and approved by the Argonne National Laboratory."
>
> (2) "It is understood and agreed that all components and assemblies of the shield windows are subject to the inspection of authorized Government representatives in manufacturer's plant and at site."
>
> (3) "The Corning Glass Works shall submit shop drawings and samples . . . as required in sufficient time to allow for processing and final approval to preclude the possibility of delaying job progress."

Although the contract with Corning Glass Works was finally negotiated by plaintiff on August 5, 1953, defendant did not finally approve all shop drawings until March 2, 1954—seventeen (17) days before the March 19, 1954 contract expiration date. The time consumed by defendant in approving shop drawings after submittal, with respect to the various types of required shield windows, was: Type I—129 days; Type II—138 days; Type III—112 days; Type IV—94 days; Type V—84 days.

On or about February 18, 1954, a representative of Argonne National Laboratory, together with a representative of the Architect-Engineer, each of whom were tutored authorities and practical experts on shield glass windows, approved all Type II windows. Thereafter, defendant made no effort to inspect glass at the source, although it was advised by plaintiff and Corning Glass Works of glass manufacturing progress. On or about June 14, 1954, [fol. 13] after all shields of glass had been delivered to the site, other representatives of defendant, who lacked academic or practical experience in the manufacture, use, or installation of shield glass, overruled the above expert representatives and rejected all Type II windows. The rejected glass was returned to Corning Glass Works on or about July 9, 1954.

Corning Glass Works maintained that the glass in question was within the tolerances established by defendant's plans and specifications and appealed to the Director of Reactor Branch, United States Atomic Energy Commission for competent unbiased inspection. Such an inspection was conducted and, on or about February 1, 1955, defendant reversed its decision and plaintiff was allowed to proceed with its work after a further delay of 35 days.

On or about August 12, 1954, defendant discovered that the mineral oils in one of the installed Type I windows had acquired a cloudy haziness. On or about August 16, 1954, Corning Glass Works advised defendant, by letter, that such cloudy condition had been encountered in other locations and that it had been determined that the condition could be eliminated by de-colorizing the oil. Despite this information defendant, on or about September 2, 1954, rejected Type I windows, without inspection or testing, on the ground that moisture in the windows was causing the cloudiness. Defendant made no effort to test the oil and determine whether actualities or prejudice was the basis of its rejection until October 15, 1954, or 43 days after the September 2, 1954 rejection. It was not until October 26, 1954, or 105 days after the cloudy oil was first [fol. 14] noted, that defendant's representatives verbally notified plaintiff that defendant's rejection was erroneous and that the cloudy oil was not plaintiff's responsibility. Installation of Type I windows was completed five days later.

Plaintiff presented a claim, under Article IV of said contract, to defendant's Contracting Officer for the extra work and costs of delay resulting from defendant's erroneous, arbitrary, unreasonable and excessive inspection and rejection, which was denied by said Contracting Officer on or about June 26, 1954. On or about June 26, 1954, plaintiff appealed to the Atomic Energy Commission's Advisory Board on Contract Appeals and the Board, in Docket No. 76, by Findings of Ract and Recommendation dated July 23, 1957, found that plaintiff could not exercise much, if any, discretion with respect to the procurement of materials for the windows; that plaintiff, in assuming defendant's initial responsibilities under said contract at

defendant's request, received no assistance from defendant in the difficulties encountered with shield windows; that the "*modus operandi* on changes and shop drawings was not calculated to assure a maximum expedition;" that plaintiff performed to the best of its ability; that plaintiff was "subjected to delays that were not of its making." Said Board allowed an extension of time under said contract to November 2, 1954, plus such additional time necessary to complete operations dependent upon window installation, but denied plaintiff's claim for increased costs.

In addition to said extension of time, plaintiff is entitled to a fair and reasonable apportionment of the (a) added [fol. 15] winter protection costs of $183,431.46, (b) added administrative, overhead and equipment costs of $216,-717.63, (c) added labor costs of $79,844.18 and (d) added excessive inspection costs of $55,000.00 attributable to such delay and failure to perform. Plaintiff will ask leave of court to amend this petition when the precise amount of such apportionment has been determined.

(c) *Amercoat Paint*—In March of 1954, plaintiff discovered that government furnished materials for the "hot shop", namely, top and bottom guide rails, four travelling boom systems and miscellaneous items of machinery, were of (1) questionable quality and (2) rust and mill scale had not been removed before a factory coat of paint had been applied, and (3) improper crating caused considerable transit damage.

Defendant directed plaintiff to perform the necessary removal of rust and mill scale and to paint all government furnished materials or equipment, including shield doors, in the "hot shop" with "Amercoat". Plaintiff proceeded with such work, under protest, maintaining that defendant's painting specifications made no mention of "Amercoat" paint being required on anything but the walls of the "hot shop". Plaintiff suspended and postponed the pouring of concrete in the "hot shop" until May, 1954, dismantled assembled shield doors, sand-blasted all surfaces and applied the "Amercoat" paint as requested by defendant.

Defendant advised plaintiff in June, 1954 that shield doors were "movable walls", and hence within the paint-

ing specifications prepared by defendant. On or about [fol. 16] December 6, 1954, after eight months of delay, successor representatives of defendant reversed the earlier decision of April, 1954, and agreed to a settlement formula with respect to the added direct costs of the additional required painting.

Plaintiff, in addition to such added direct costs, is entitled to recover a fair and reasonable apportionment of the total increase in (a) winter protection costs of $183,431.46, (b) added administrative, overhead and equipment costs of $216,717.63, (c) added labor costs of $79,844.18, and (d) added excessive inspection costs of $55,000.00 attributed to such delay and failure to perform. Plaintiff will ask leave of court to amend this petition when the precise amount of such apportionment has been determined.

8. Plaintiff estimates that ninety per cent (90%) of the aggregate of said additional costs referred to in paragraphs 6 and 7 hereof were due to defendant's delays and failures to perform in accordance with said contract, representations and implied and express warranties, on the phrases of said project specified in sub-paragraphs 7(a), (b), (c), (d) and (e); therefore, plaintiff incorporates herein by reference said sub-paragraphs as the major, aggragated, serious, independent and specific failures by defendant to perform in accordance with said contract, representations, and implied and express warranties.

9. Subsequent to the award by defendant on March 19, 1953, of said contract, Exhibit "A" hereto, and thereafter, during the entire course of plaintiff's work, including, but [fol. 17] not limited to, the above five phases of said project (sub-paragraphs 7(a), (b), (c), (d) and (e) herein), and continuing until the work was completed and accepted on January 7, 1955, defendant failed to make necessary corrections relating to design and general arrangement, or to pass upon shop drawings with reasonable promptness in accordance with said contract.

On or about April 15, 1953, defendant's Architect-Engineer directed plaintiff to forward shop drawings for approval to Los Angeles, California. Plaintiff objected

to such procedure on the grounds that the specifications called for inspection by the defendant, presumably at the job-site, and that such procedures would cause delay. On or about April 27, 1953, defendant modified the Architect-Engineer's above direction and instructed plaintiff to submit shop drawings to the Architect-Engineer at Idaho Falls, Idaho. This modified procedure compounded the delays anticipated earlier by plaintiff since the Architect-Engineer submitted such shop-drawings to its office in Los Angeles, California, in spite of defendant's modification of April 27, 1953, and added a transmittal link in the procedure for the submission and approval of shop-drawings. During the entire course of plaintiff's work there was a five to seven week elapse of time between shop-drawing submittal by plaintiff and approval by defendant resulting in a four-month over-all delay on the project. Defendant's failure to promptly pass upon shop-drawings was due partly to its lack of supervision and qualified personnel at the job-site, necessitating transmittal of such drawings to the Architect-Engineer's main office in Los [fol. 18] Angeles, California, and in large part, to inadequate specifications for which a desired end-result, if any, could not be obtained by alteration of such drawings without making in effect, major and material changes, alterations and additions to such plans and specifications by unreasonably, arbitrarily and excessively imposing on plaintiff added design responsibility and extra work.

Defendant well knew at the time that it awarded said contract to plaintiff that its end-result, as represented in said contract, was not the end-result it would ultimately desire; and, further, defendant well knew that the statement of work and plans and specifications for this entire project were not, as represented, adequate for producing the end-result represented in said contract, or any end-result which defendant desired.

As a result of defendant's failure to formulate a desired end-result prior to the award to plaintiff of said contract, and, as a result of defendant's failure to prepare adequate plans and specifications for the construction and completion of the end-result represented in said contract, or any end-result, and as a result of defendant's attempt to formulate and carry out the actual end-result during

the course of plaintiff's work by imposing additional design and extra work through shop-drawing procedures, said contract became, in effect, a nullity, and plaintiff was obliged to incur actual costs of $6,415,858.75 for the completion of said contract, or $1,100,965.23 in excess of the contract price of $5,314,893.52.

10. No one other than the plaintiff is the owner of the claims herein and no assignment or transfer of the same [fol. 19] has been made. No other action has been had on said claim in Congress, or by any of the departments except as herein alleged, and plaintiff is justly entitled to the amounts herein claimed from the United States, after allowing all just credits and set offs.

WHEREFORE, plaintiffs prays (1) that said contract be rescinded and declared null and void, and demands judgment for its actual costs of performance on said project in the amount of $6,415,858.73 plus a reasonable profit of six per cent (6%) or a total of $6,800,809.73, less the actual amount paid under said contract, $5,314,893.52, or a total sum due of $1,485,916.21; or, alternatively, plaintiff demands judgment in the amount of $666,541.15 for defendant's delays on said project; or, alternatively, plaintiff demands judgment for ninety per cent (90%) of said defendant's delays occurring on the herein described major phases of said contract, namely, the sum of $590,893.02.

/s/ Gardiner Johnson
111 Sutter Street,
San Francisco 4, California
Attorney for Plaintiff.

THOMAS E. STANTON, JR.,
CHARLES J. HEYLER,
Of Counsel.

[fol. 20]

EXHIBIT A TO PETITION (EXCERPTS)

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 19th day of March, 1953, by THE UNITED STATES OF AMERICA, hereinafter called the Government, represented by the contracting officer executing this contract, and UTAH CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Utah, of the city of Salt Lake City in the State of Utah, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

* * * *

[fol. 21]

* * * *

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at

the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon prompty investigate the conditions, and if he finds that they do so materially differ the contract shall be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

* * * *

[fol. 22]

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ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor

and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

* * * *

[fol. 23]

* * * *

ARTICLES 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 16. *Payments to contractors.*—* * *

* * * *

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

* * * *

[fol. 24] 11/17/52

SPECIFICATIONS FOR CONSTRUCTION CONTRACT

GENERAL CONDITIONS

* * * *

[fol. 25]

* * * *

GC-25 SUSPENSION OF WORK. The Commission may by written order direct the Contractor to suspend all or any part of the work for such period of time as may be determined by the Commission to be necessary or desirable for the convenience of the Government. If such suspension delays the progress of the work and causes additional expense or loss to the Contractor in the performance of the work, not due to the fault or negligence of the Contractor, the Commission shall make an equitable adjustment in the contract price and time of performance and modify the contract accordingly; *Provided*, however, that no adjustment will be made under this article for suspensions ordered under any other article of the contract or provision of the specifications; and *provided further*, that any claim for adjustment hereunder must be asserted within 30 days from the date such suspension is ordered. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in the article of this contract entitled "Disputes".

* * * *

[fol. 26]

IN THE UNITED STATES COURT OF CLAIMS

No. 3-61

[Title Omitted]

DEFENDANT'S ANSWER—Filed November 1, 1961

As and for its answer herein defendant alleges as follows:

1. Defendant's attorney does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the petition, and defendant therefore denies them.

2. Defendant admits the allegations contained in paragraph 2 of the petition except the defendant refers to all the contract documents and drawings for an ascertainment of their contents.

3. Defendant's attorney does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the petition, and defendant therefore denies them.

4. Answering paragraph 4 of the petition defendant admits that plaintiff received a notice to proceed dated March 19, 1953. Defendant denies the remaining allegations contained in paragraph 4 of the petition.

[fol. 27] 5. Answering paragraph 5 of the petition defendant admits that the work under the contract was completed on or about January 7, 1955, and that the work was completed within the contract time as extended. Defendant further alleges that plaintiff has already been paid by the defendant all that it was entitled to receive as a result of the performance of the contract. Defendand denies the remaining allegations contained in paragraph 5 of the petition.

6. Defendant denies the allegations contained in paragraph 6 of the petition.

Defendant further alleges that any claims based on extra work are irrelevant, immaterial and outside the scope of plaintiff's claim filed herein for breach of contract. (See

page 5, items numbers 7 and 8 in plaintiff's objection to defendant's motion for more definite statement filed herein September 27, 1961.)

7. Defendant denies the allegations contained in the first sentence of paragraph 7 of the petition.

7(a) Defendant admits the allegations contained in the first sentence of subparagraph (a) of paragraph 7 of the petition. Defendant denies the remaining allegations contained in the first paragraph of subparagraph (a) of paragraph 7. Defendant further alleges that plaintiff never made any claim for "float rock" during the time of the performance of the contract.

Defendant admits the allegations contained in the second paragraph of subparagraph (a) of paragraph 7 of the petition.

[fol. 28] Answering the third paragraph of subparagraph (a) which begins "On or about April 27," defendant admits that plaintiff took an appeal to the Atomic Energy Commission's Advisory Board on Contract Appeals and that that Board in Docket No. 87 heard the appeal, and rendered a decision. Defendant refers to this decision of that Board for a complete statement of the decision of the Board. Defendant further alleges that there is no allegation contained in the petition that this decision was arbitrary, capricious, or not supported by substantial evidence.

Defendant further alleges that any discussion based on "changed conditions" is irrelevant, immaterial and outside the scope of this cause of action for a breach of contract. (See page 5, items numbers 7 and 8 in plaintiff's objection to defendant's motion for more definite statement filed herein September 27, 1961.)

Defendant denies the allegations contained in paragraph 4 of subparagraph (a) of paragraph 7 of the petition which begins "Defendant well knew, or should have known,". Defendant incorporates by reference herein its allegations made in paragraph 6 of this answer concerning the irrelevance and immaterially of claims based on extra work under plaintiff's breach of contract theory. Defendant further specifically denies that plaintiff is entitled to receive any sum from the defendant.

7(b) Defendant admits the allegations contained in the first sentence of paragraph 7(b) of the petition which begins "It was contemplated". Defendant admits that the concrete mixture being used was deficient in the [fol. 29] strength requirements as specified by the contract. Defendant denies the remaining allegations contained in the first paragraph of paragraph 7(b) of the petition.

Answering the second paragraph of 7(b) of the petition defendant admits that there were fines in the concrete aggregate furnished by the defendant to the plaintiff. Defendant denies that the fines in the concrete aggregate caused the deficient strength. Defendant admits that it had the fines removed from some of the concrete aggregate. Defendant further admits that it authorized the plaintiff at defendant's cost to increase the concrete mixture by one bag of cement to six instead of the originally specified five bags of cement per cubic yard. Defendant admits that the added bag of cement provided additional strength and denies that this increased the plaintiff's finishing costs. Defendant further alleges that the plaintiff was fully paid in March 1954, for the extra cement plus an allowance for supervision, general expense and profit.

Answering the third paragraph of 7(b) of the petition which begins "On or about July 19, 1956," defendant admits that plaintiff presented this claim to the Contracting Officer long after all of the work under the subject contrace was completed.

Answering paragraph 4 of paragraph 7(b) of the petition which begins "Said Contracting Officer" defendant admits that the Contracting Officer denied the claim and further admits that the plaintiff took an appeal (Docket No. CA-121) to the Contract Appeals Board and that the decision rendered on that appeal denied the plaintiff's [fol. 30] claim. Defendant refers to the Contracting Officer's decision and to the decision of the Hearing Examiner for a complete statement of these decisions.

Defendant further alleges that there is no allegation contained in the petition that this decision by the Hearing Examiner was arbitrary, capricious or not supported by

substantial evidence. Defendant further alleges that plaintiff did not petition the Atomic Energy Commission for a review of the Hearing Examiner's decision even though it had a right to petition for this review under the terms of the applicable regulations for administrative remedies. Defendant further alleges that under these same regulations in the absence of such a petition for review, the decision of the Hearing Examiner became the final action of the Commission sixty days after it was rendered.

Defendant denies the allegations contained in paragraph 5 of subparagraph 7(b) which begins "Due to the delays". Defendant further incorporates herein by reference its allegations contained in paragraphs 6 and 7 of this answer at pages above concerning the irrelevance and immateriality of claims based on extra work and changed conditions under plaintiff's theory of breach of contract.

7(c) Defendant's attorney does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 7(c) of the petition and defendant therefore denies them. Defendant denies the remaining allegations contained in the said paragraph.

Defendant denies the allegations contained in the second paragraph of subparagraph 7(c) of the petition.

[fol. 31] Answering the third paragraph of subparagraph 7(c) of the petition which begins "On or about October 29, 1955," defendant admits that plaintiff's claim was denied by the Contracting Officer, and that the Atomic Energy Commission's Advisory Board on Contract Appeals in a decision dated April 25, 1957 (Docket No. 95) upheld the Contracting Officer's decision and to the Board decision for a complete statement of these decisions.

Defendant further alleges that there is no allegation contained in the petition that the decision of the Board was arbitrary, capricious or not supported by substantial evidence.

Defendant denies the allegations contained in paragraph 4 of subparagraph 7(c) of the petition which begins

"Plaintiff is entitled" and specifically denies that plaintiff is entitled to recover any sum from the defendant. Defendant incorporates herein by reference its allegations contained in paragraphs 6 and 7 at pages above concerning the irrelevance and immateriality of claims based on extra work and changed conditions under the plaintiff's theory of breach of contract.

7(d) Defendant admits the allegations contained in the first sentence of paragraph 7(d) of the petition. Further answering the said subparagraph, defendant admits that the quoted language from the plaintiff's contract with Corning Glass Works which is set out at the top of page 12 of the petition appears in that contract. Defendant [fol. 32] denies that the language appears in the contract as a result of defendant's insistence. Defendant refers to the plaintiff's entire contract with Corning Glass Works for a complete statement of its terms and conditions.

Defendant denies the allegations contained in the second paragraph of subparagraph 7(d). Defendant further alleges that substantially all of the diagrams, specifications and shop drawings for the windows had been approved on a date prior to December 30, 1953 when the plaintiff finally entered into the negotiated price agreement with the defendant for the installation of the shield windows. Accordingly, any costs for delays on account of approval of the shop drawings which occurred prior to the time the plaintiff entered into this negotiated agreement were, or should have been, included in the price which the plaintiff charged the defendant under the terms of the negotiated agreement.

Defendant denies the allegations contained in the third paragraph of subparagraph 7(d) of the petition which begins "On or about February 18, 1954".

Defendant denies the allegations contained in paragraph 4 of subparagraph 7(d) of the petition, and defendant further alleges that the work under this contract was completed on or about January 7, 1955 as plaintiff alleges in paragraph 5 of the petition.

Answering the first sentence of paragraph 5 of subparagraph 7(d) defendant alleges that defendant and

representatives of the plaintiff discovered the cloudy haziness in one of the shield windows. Answering the [fol. 33] second sentence of the said paragraph defendant admits that it received a letter concerning this condition from the Corning Glass Works and refers to that letter for a statement of its contents. Defendant denies the third sentence of the said paragraph and specifically denies that it rejected the windows. Defendant alleges that its representative advised the plaintiff that it would be proceeding with the installation of the windows at its own risk if it installed them prior to the time that the matter of the haze condition was cleared up. Defendant denies the allegations contained in the fourth sentence of the said paragraph. Defendant denies the allegations contained in the fifth sentence of the said paragraph and specifically denies that any delay in the installation of the windows held up any of the other contract work which remained to be done. Answering the last sentence of the said paragraph defendant admits that practically all of the work of the installation of the Type I shield windows had been completed prior to the time that the hazy condition was discovered and that this work was entirely completed shortly after plaintiff recommenced it.

Answering paragraph 6 of subparagraph 7(d) defendant admits that the plaintiff presented a claim to the Contracting Officer and that after the denial of this claim the plaintiff appealed to the Atomic Energy Commission's Advisory Board on Contract Appeals. Defendant further admits that in Docket No. 76 the Board decided that the plaintiff was entitled to an extension of time but was not entitled to any extra compensation. Defendant refers to [fol. 34] the decisions of the Contracting Officer and the Board for a complete statement of these decisions.

Defendant further alleges that there is nothing in the plaintiff's petition which alleges that the said decision of the Board was arbitrary, capricious or not supported by substantial evidence.

Defendant denies the allegations contained in the last paragraph of subparagraph 7(d) which begins "In addition to said extension of time" and specifically denies that plaintiff is entitled to receive any sum from the de-

fendant. Defendant incorporates herein by reference its statements in paragraphs 6 and 7 at pages above concerning the irrelevance and immateriality of claims based on extra work and changed conditions under plaintiff's theory of breach of contract.

7(e)[1] Defendant denies all of the allegations contained in all of the paragraphs of the petition beginning with numbered paragraph 7(e) and continuing down to paragraph 8.

In clarification of these items of claim the defendant deems it necessary to make the following allegations: There were 3 claims by the plaintiff concerned with Amercoat Paint under this contract. One of these claims was the subject of item 4 of Contract Modification 20 in which the plaintiff was fully paid for its work. A second claim was the subject of item 7 of Modification 20 of the con- [fol. 35] tract in which plaintiff was again fully compensated for that work. The third claim was on account of the withholding of funds from the plaintiff by the defendant because certain of the plaintiff's Amercoat Paint work cracked and peeled and had to be redone by another contractor at defendant's expense. This third claim was the subject of a reservation in the release which was executed by the plaintiff and which is discussed in defendant's affirmative defense number I at page below. This third claim was later also paid by the defendant. Accordingly, all of the plaintiff's claims for Amercoat Paint have been fully paid and settled, and the only one which was the subject of a reservation in the release was paid by the defendant after the release was executed.

Defendant incorporates herein by reference its allegations contained in paragraphs 6 and 7 above concerning the irrelevance and immateriality of claims based on extra work and changed conditions under plaintiff's theory of breach of contract, and defendant specifically denies that plaintiff is entitled to recover any sum from the defendant.

8. Defendant denies the allegations contained in paragraph 8 of the petition.

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[1] This paragraph is again marked in the petition (c) but probably should be (e).

9. Defendant denies the allegations contained in the first paragraph of numbered paragraph 9 of the petition.

Answering the second paragraph in numbered paragraph 9 defendant admits that in order to save time defendant's Architect-Engineer directed plaintiff to forward shop drawings for approval to its office at Los Angeles, [fol. 36] California. Answering the second sentence of the said paragraph defendant admits that the plaintiff objected to this procedure on the ground, among others, that under this arrangement it would have to pay the air mail postage for the forwarding of the drawings. Defendant refers to that letter for a full statement of its contents. Defendant admits the allegations contained in the third sentence of the said paragraph which ends with the phrase "at Idaho Falls, Idaho". Defendant further alleges that in certain instances approval of shop drawings was waived in order to expedite the work. Defendant denies all of the remaining allegations contained in all of the remaining paragraphs of paragraph 9.

Defendant incorporates herein by reference its allegations contained in paragraphs 6 and 7 above concerning the irrelevance and immateriality of claims based on extra work and changed conditions under plaintiff's theory of breach of contract.

10. Defendant denies the allegations contained in the first sentence of paragraph 10 of the petition. Defendant's attorney does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in the remainder of paragraph 10 of the petition, and defendant therefore denies them. Defendant further specifically denies that the plaintiff is due any sum from the defendant.

11. Defendant denies each and every allegation contained in the petition including those in the Wherefore Clause which are not specifically admitted or qualified herein.

[fol. 37] AFFIRMATIVE DEFENSES

I. Release

12. In a release dated March 22, 1957, plaintiff herein released the Government from all claims arising under, in

connection with or by virtue of the subject contract and all modifications thereto with the exception of the shield window claim, the pier drilling claim, the shield door claim, the concrete aggregate claim, and the sum of $5,606.39 which was withheld pending a decision in the Amercoat appeal.

Subsequent to the execution of this release, defendant paid the plaintiff the sum of $5,606.39 in settlement of the Amercoat Paint appeal. Accordingly, all claims under this contract except those for shield windows, pier drilling, shield doors and concrete aggregate are forever released. Consequently, in so far as any claims in plaintiff's petition relate to or arise in connection with any matters except the shield windows, pier drilling, shield doors, and concrete aggregate, these claims are barred by the said release.

II. Payments

13(a) Concrete Aggregate And Related Claims (Pet. 7(b))

By letters dated July 23 and July 31, 1953 plaintiff requested that defendant furnish it with clean aggregate and compensate it for the extra bag of cement which it had begun putting in the concrete mix at defendant's direction. By letter dated February 9, 1954, plaintiff, referring to the direction to it to use an extra bag of [fol. 38] cement, and to its own letter of July 23 requesting reimbursement, submitted a statement in the amount of $8,640 which included provisions for the cost of the cement, and for supervision, general expense, and profit.

Defendant caused the aggregate to be cleaned, and on March 20, 1954 paid plaintiff according to the account which it had stated. This fulfillment by the defendant of all of plaintiff's requests as they were expressed in the two letters of July 23 and 31, and the statement of account of February 9, including extra payment for general expense constitutes a complete settlement of all phases of this claim.

(b) Amercoat Paint

By agreement of the parties in Contract Modification 20, items 4 and 7, plaintiff was fully compensated for all of its claims based on Amercoat painting, cleaning, etc. except for the claim which it reserved in the release. Subsequent to the execution of the release, defendant also paid that claim which had been reserved. Accordingly, all of plaintiff's claims based upon or arising in connection with Amercoat Paint have been fully paid and satisfied.

III. Estoppel

14(a) Concrete Aggregate And Amercoat Paint

Defendant incorporates by reference here its allegations contained in paragraphs 13(a) and (b) immediately above. After statement of account or price negotiations followed by payment, and the lapse of a considerable period of time, plaintiff is estopped from adding to the set-
[fol. 39] tled claims other alleged costs which are allegedly based upon these settled claims.

(b) Shield Window Claim

Defendant incorporates here by reference its allegations in paragraph 7(d) above concerning the fact that at the time plaintiff entered into the negotiated price agreement with defendant for installation of the shield windows substantially all of the shop drawings had already been approved. Having entered into this negotiated price agreement, plaintiff is estopped from now asserting delay costs based on delivery of shop drawings which occurred prior to the execution of the price agreement.

IV. Failure To Exhaust Administrative Remedies

15(a) Finishing And Other Costs Based On The Aggregate Claim

More than one year after the work under the subject contract was completed, plaintiff presented a claim concerning these alleged finishing and other costs based on the aggregate claim to the Contracting Officer. The Contracting Officer denied the claim. Subsequently the Atomic Energy Hearing Examiner held in Docket No. CA-121 that this late claim by plaintiff was untimely under the

terms of the contract. The Atomic Energy Commission's rules of procedure provided for review of the Hearing Examiner's decision by the Atomic Energy Commission. However, plaintiff did not petition for this review. Accordingly, plaintiff failed to exhaust its administrative remedies, and this claim (Pet. 7(b) *et seq.*) is barred in this Court.

[fol. 40] (b) Pier Drilling (Docket No. 87)

On February 18, 1955, approximately a month after completion of the entire contract, plaintiff first presented a claim for "float rock" in connection with pier drilling for the foundation. Defendant alleges that this was an untimely presentation of a claim which arose, if it arose at all, at the very beginning of the contract in the Spring of 1953.

Still later plaintiff presented a larger claim for additional compensation and an extension of time in connection with the pier drilling claim. Defendant alleges that this claim was likewise untimely. After this larger claim was denied by the defendant's Contracting Officer, plaintiff appealed this denial to the Atomic Energy's Advisory Board on Contract Appeals. In Docket No. 87 the Board held among other things that no additional cost to plaintiff resulted from such changed condition except in so far as plaintiff was liable over to its drilling subcontractor. The Board recommended that this matter be remanded to the Contracting Officer for a determination whether or not plaintiff was thus actually liable to its subcontractor.

After the matter was remanded to the Contracting Officer, that officer wrote plaintiff in a letter dated July 25, 1958 to ascertain whether plaintiff intended to attempt to prove actual damages of its own. Plaintiff never requested an opportunity to submit such proof. Accordingly, plaintiff failed to exhaust its administrative remedies in connection with the pier drilling claim (Pet. 7(a) *et seq.*).

[fol. 41] (c) Amercoat Paint

Plaintiff never took an administrative appeal in connection with the two items of its Amercoat Paint claim which were settled by items 4 and 7 of Modification 20.

Accordingly, all claims based on these items are barred by plaintiff's failure to exhaust its administrative remedies as well as by plaintiff's acceptance of payment in settlement of these items.

(d) Dockets Numbers 76 and 95

These claims concerning shield windows and shield doors were also remanded to the Contracting Officer for a determination of whether plaintiff was entitled to further extensions of time. Plaintiff was requested by letter dated July 25, 1958 to notify the Contracting Officer if it wished to proceed further in these matters. Plaintiff having received extensions of time by contract modification did not make such a request and accordingly it failed to exhaust its administrative remedies in this regard. Therefore any matters which were encompassed in these appeals that appear in plaintiff's petition are barred by its failure to exhaust administrative remedies.

(e) Other Administrative Appeals

In addition to the administrative appeals which are discussed above, plaintiff herein began the processing of two other appeals. These were Dockets Nos. 91 and 96 concerning extensions of time, and a claim in connection with generators.

The Atomic Energy Commission Advisory Board remanded these matters back to the Contracting Officer for [fol. 42] further proceedings. The petition contains no allegations that these decisions were arbitrary capricious or not supported by substantial evidence. After the remand, plaintiff abandoned the generator claim and never requested further proceedings regarding the time extensions because it received sufficient extension by negotiation. Accordingly, in so far as any matters contained in the present petition are encompassed by these appeals which plaintiff allowed to die such matters are barred in this Court by plaintiff's failure to exhaust available administrative remedies.

V. Laches

16. (a) On February 18, 1955, more than a month after the work under the subject contract was completed,

plaintiff for the first time presented a claim on account of "float rock" which it alleged was encountered by its drilling subcontractor when it was drilling the holes for the foundation piers. According to the petition this condition was discovered on or about June 1, 1953. However, plaintiff waited until all of the holes were filled with concrete and indeed until after all of the contract work was completed before it presented this claim thereby preventing the defendant from investigating the matter and from mitigating damages, if there were any. Plaintiff's failure to promptly notify the Contracting Officer of this situation violated the terms of the contract and damaged the defendant. Accordingly, this claim should be barred by laches.

(b) Concrete Aggregate

On March 20, 1954, defendant paid plaintiff according [fol. 43] to its statement of account for extra cement and for supervision, general expense and profit in connection therewith.

On July 19, 1956, more than a year after the completion of the contract, plaintiff presented an additional claim based on the aggregate claim in the sum of $109,-356. Plaintiff's failure to promptly notify the Contracting Officer of this new claim based on an already settled claim prevented the defendant from promptly investigating the alleged situation and prevented the mitigation of damages, if there were any. Accordingly, this claim should be barred by laches.

(c) Shield Doors

Plaintiff did not present this claim until after the completion of the contract and accordingly defendant was prevented from promptly investigating the situation and from mitigating the damages, if there were any. Accordingly, this claim should be barred by laches.

(d) Shield Windows

(1) Claim For Delay In The Delivery Of Shop Drawings Which Occurred Prior To The Execution Of The Negotiated Price Agreement. On December 30, 1953 plain-

tiff and defendant entered into a negotiated price agreement for the installation by plaintiff of the shield windows. Defendant had a right to rely upon the fact that the price which was fixed in this agreement took into account any prior damages and delays which the plaintiff might have suffered in connection with the shield windows. However, plaintiff later presented a claim based in part upon alleged delays which occurred prior to the execution [fol. 44] of the price agreement. This late presentation of this portion of the claim damaged the defendant and prevented its making a prompt investigation of the situation and mitigating damages, if there were any. Accordingly, this claim should be barred by laches.

(2) Presentation Of A More Limited Claim Than The One Which Is Presented Here. Even when the contractor first presented this claim to the Contracting Officer (on June 23 and 24, 1954) it only alleged three conditions which were: lateral movement and distortion of the Koroseal gaskets under compression, specifications which were too indefinite, and use of a selective assembly procedure in the assembly of the shield windows.

It was only later, during November 1955, at the Board Hearing that plaintiff raised numerous other issues such as revisions made under the contract, delays in submitting drawings, etc. This delay in the presentation of these various claims and issues by the plaintiff prevented the defendant from promptly investigating the situation and mitigating damages, if there were any. Accordingly, this entire claim concerning shield windows should be barred by laches.

(e) Amercoat Paint Claims

By payment of these various claims as alleged in paragraph 13(b) above, defendant had a right to believe that these claims were settled. Plaintiff by raising matters based upon these claims at this late date has obviously prevented the defendant from promptly investigating the situation and mitigating damages, if any, which occurred in connection with these new matters based upon the old claims. Accordingly, these claims should be barred by laches.

[fol. 45] (f) Delay In The Presentation Of The Entire Claim

The work under this contract was completed on January 7, 1955. However, plaintiff waited 5 years and 364 days until January 6, 1961 before filing its petition in this Court. This further delay in addition to those recited in the foregoing paragraphs compounds defendant's damage. For defendant will obviously encounter considerably more difficulty and will have to incur considerably more expense in defending this action than would have been necessary had the petition been filed promptly, or even within a reasonable time after completion of the contract. This is particularly true in a construction case such as this where most of the contract workers scatter to other locations soon after the completion of the job. Five years and 364 days later they are considerably more difficult to locate, and their memories are less vivid than would have been true had the petition been filed promptly. Accordingly, this entire claim should be barred by laches.

VI. Equitable Estoppel

17. Defendant incorporates here by reference all of paragraph 16 and all of its subparagraphs immediately above except the last sentence in the paragraph and in each subparagraph. Defendant substitutes the following sentence in place of the last sentence in each instance. "Accordingly, this claim should be barred by equitable estoppel."

[fol. 46] WHEREFORE, defendant prays that plaintiff's petition be dismissed.

/s/ William H. Orrick, Jr.
Assistant Attorney General
Civil Division

/s/ Melford O. Cleveland
Attorney, Civil Division
Department of Justice

[fol. 47] [File Endorsement Omitted]

[fol. 48]

IN THE UNITED STATES COURT OF CLAIMS

No. 3-61

[Title Omitted]

DEFENDANT'S AMENDED ANSWER—Filed November 30, 1961

Pursuant to Rule 18(a) of the Rules of this Court defendant amends its answer as follows:

2. Paragraph 2 of defendant's answer is deleted and the following paragraph is substituted therefor:

> 2. Defendant admits the allegations contained in paragraph 2 of the petition with the exception of the phrase "except as hereinafter alleged". Defendant denies the allegations contained in this phrase. Defendant refers to all the contract documents and drawings for an ascertainment of their contents.

7(b) Defendant substitutes the following sentence in place of the second sentence in subparagraph 7(b) of its answer:

> Defendant admits that some of the concrete mixture being used was deficient in the strength requirements as specified by the contract.

Defendant substitutes the following sentence in place of the third sentence in the second paragraph of subparagraph 7(b) of its answer:

> Defendant admits that it had fines removed from some of the concrete aggregate.

[fol. 49] 7(c) Defendant substitutes the following sentence in place of the first sentence in the third paragraph of subparagraph 7(c) of the petition:

> Answering the third paragraph of subparagraph 7(c) of the petition which begins "On or about Oc-

tober 29, 1955," defendant admits that plaintiff's claim which was in the sum of $4,457.25 for eleven items of allegedly extra work, was denied by the Contracting Officer with the exception of two items totaling $53.00 which were allowed; and that the Atomic Energy Commission's Advisory Board on Contract Appeals in a decision dated April 25, 1957 (Docket No. 95) upheld the Contracting Officer's decision.

7(d) Defendant substitutes the following sentence in place of the first sentence in subparagraph 7(d) of its answer:

Defendant admits the allegations contained in the first sentence of subparagraph 7(d) of the petition except that defendant denies that the contract was negotiated under the general direction of defendant.

9. Defendant substitutes the following sentence in place of the third sentence in the second paragraph in numbered paragraph 9 of the answer:

Defendant refers to this letter of plaintiff's dated April 21, 1953, for a full statement of its contents.

13. (a) Defendant inserts the following paragraph as paragraph 13(a) of the answer:

13. (a) Pier Drilling Claim (Petition 7(a) *et seq.*)

It was originally anticipated that the contractor would drill the pier holes two feet into solid lava bedrock and that this bedrock would probably be encountered below elevation 4747'. The contractor, through a subcontractor, proceeded with the pier drilling until June 1, 1953 when it notified the AEC that it had encountered a changed subsurface condition and was ceasing operations.

[fol. 50] After investigation the AEC determined that in 47 cases out of the 111 pier holes on which drilling had been commenced, lava bedrock was encountered above elevation 4747'. The contractor was thereafter permitted to drill each pier hole two feet into solid lava bedrock and stop whether this bed-

rock was encountered above or below elevation 4747'; and was paid for this two feet at the rate provided for solid lava rock excavation. (The subject of "float rock" was never mentioned at that time.)

Plaintiff accepted this adjustment together with the payments made in accordance with its terms, and recommended and finished the pier drilling without protest. This payment made under these circumstances which was accepted by plaintiff without protest constitutes a complete settlement of all phases of the pier drilling claim.

(b) Defendant changes numbered paragraph 13(a) in the original answer to numbered paragraph 13(b) in the amended answer.

(c) Defendant changes numbered paragraph 13(b) in the original answer to numbered paragraph 13(c) in the amended answer.

14. (a) Defendant substitutes the following for the heading and first sentence in paragraph 14(a) of the answer:

> 14. (a) Pier Drilling, Concrete Aggregate, And Amercoat Paint
>
> Defendant incorporates by reference here its allegations contained in paragraphs 13(a), (b), and (c) immediately above.

(b) Defendant substitutes the following sentence in place of the last sentence in paragraph 14(b) of the answer.

> Having entered into this negotiated price agreement, plaintiff is estopped from now asserting delay costs based upon any activities in connection with the shield windows which occurred prior to the execution of the price agreement.

[fol. 51] All other language in the original answer remains as it was originally filed.

WHEREFORE, defendant prays that plaintiff's petition be dismissed.

/s/ William H. Orrick, Jr.
Assistant Attorney General
Civil Division

/s/ Melford O. Cleveland

/s/ James F. Merow
Attorney, Civil Division
Department of Justice

[fol. 52] [File Endorsement Omitted]

[fol. 53]

IN THE UNITED STATES COURT OF CLAIMS

No. 3-61

[File Endorsement Omitted]

[Title Omitted]

COMMISSIONER'S ORDER AND MEMORANDUM RE APPLICABILITY OF BIANCHI DECISION—February 18, 1964

In March 1953 the plaintiff was awarded a contract to construct an assembly and maintenance area for the Atomic Energy Commission's National Reactor Testing Station in Idaho for completion a year later. The contract was completed on January 7, 1955, the time having been extended by defendant. Numerous claims were made by the plaintiff during and after contract performance. Some were settled and paid; others were the subject of adverse decisions by the contracting officer and the representative of the head of the department (in one instance a Hearing Examiner and in the other claims the AEC Advisory Board on Contract Appeals). The particular claims presented in the petition which were con-

sidered in whole or in part administratively relate to Pier Drilling, Concrete Aggregates, Shield Doors, Shield Windows, and Amercoat Paint. Another general catch-all claim sounding in breach of contract is alleged in paragraph 9 of the petition but was not claimed administratively.

[fol. 54] On March 22, 1957, the parties entered into a Receipt and Release under which, in consideration of the payment of $52,382.92, the plaintiff released the Government from all claims "of whatever kind or character, arising under, in connection with or by virtue of" the contract, with certain enumerated exceptions covering the administrative claims for Shield Windows, Pier Drilling, Shield Door, Concrete Aggregate, and Amercoat Paint.

On June 17, 1963, the undersigned commissioner directed the parties to file briefs to enable him to decide to what extent the case is bound by the decision in *United States* v. *Bianchi*, 373 U.S. 703 (1963). Briefs were filed by the parties indicating the need for a separate determination as to each of the several claims contained in the petition. In order to ascertain the exact nature of the administrative determinations the commissioner borrowed from the defendant the administrative files in each of the administrative appeals, and examined carefully as to each the contractor's claims and the decisions of both the contracting officer and the AEC on appeal. As a result of such examination, and in consideration of the briefs of the parties, certain conclusions were reached as set forth in the following paragraphs:

[fol. 55] *Pier Drilling Claim*

At the outset of its contract performance the plaintiff ran into float rock in drilling holes in the ground for concrete piers. On June 1, 1953, it notified the contracting officer that it had encountered subsurface conditions materially differing from those indicated in the drawings and specifications. On February 18 and March 31, 1955, the plaintiff filed its formal claims with the contracting officer, the first requesting payment of the increased

drilling costs caused by the changed subsurface conditions, and the second demanding payment of its costs resulting from the delays caused by the subsurface conditions which it alleged postponed the concrete pouring to the winter months. The contracting officer denied both claims, ruling that the rock encountered did not constitute a changed condition and that in any event did not entail the use of any extra drilling equipment which increased plaintiff's costs. The plaintiff appealed to the AEC. After a hearing, the ABCA ruled on April 30, 1957 that the float rock encountered by plaintiff constituted a changed condition and caused a delay in drilling and excavation, but did not cause delays throwing the concrete pouring into winter weather, which situation instead was caused by another dispute over the quality of concrete aggregates purchased by plaintiff from the Government. The record before the Board was not sufficient to determine (1) the increased costs of drilling caused by the changed subsurface conditions, or (2) whether plaintiff was liable to its drilling subcon- [fol. 56] tractor under the terms of the subcontract or otherwise. The Board remanded these questions to the contracting officer for determination.

In its brief to the court the defendant says that, although the plaintiff conferred with the contracting officer subsequent to the remand of the claim by the Board, the plaintiff never undertook further proof of its increased drilling costs, and the contracting officer advised plaintiff that it considered the matter closed in the absence of further proof. The defendant says that plaintiff took no further action administratively, and that therefore the claim should be dismissed here for plaintiff's failure to exhaust its administrative remedies. The defendant has submitted copies of the contracting officer's correspondence with plaintiff relating to the remand, and there is no response indicated to the last letter of the contracting officer on July 25, 1958, stating that, following a conference, it was the contracting officer's understanding that plaintiff was not in a position to prove increased costs due to drilling under the Board's criteria.

The net effect of the foregoing recital of administrative proceedings is that *first*, the Board has ratified the decision of the contracting officer that the plaintiff's excavation difficulties at the outset of the contract were not responsible for the delay in pouring concrete in the winter months and the consequent winter protection expenses; and *second*, the plaintiff has failed to exhaust [fol. 57] any administrative remedy it might have with reference to the excessive drilling costs it experienced as the result of changed subsurface conditions found by the Board.

The Board had no authority to adjudicate the first element of plaintiff's claim because the relief sought was for the recovery of unliquidated damages for delays allegedly caused by the Government. The Board's sole power under the contract was to adjudicate equitable adjustment for the changed subsurface conditions, and the plaintiff's expenses providing winter protection for the freshly poured concrete could not be paid as part of an equitable adjustment because it was not expended in direct relation to the drilling either in point of time or in function. Since the Board could not adjudicate such a claim, its findings as to the cause of the delay lack the finality accorded by the disputes clause to findings of fact under the Disputes Clause, for findings made as to facts underlying a claim cognizable only in the courts are merely advisory. Therefore, in reviewing the decision on this element of the claim the court is not restricted to the administrative record but may receive and consider evidence *de novo*.

As to the remanded part of the claim, the determination of the amount of the excess drilling costs is a matter of fact under the changed conditions clause, but the determination of whether plaintiff can sue in behalf of its [fol. 58] subcontractor is a matter of law because it involves a legal interpretation of the subcontract provisions or a legal analysis of any other circumstances which might prevent the subcontractor's recovery from the plaintiff. The plaintiff had to establish both of these propositions in order to recover administratively, and no doubt the agency was ready and willing to pass

on them both if the plaintiff had prosecuted its claim to the end, even though strictly speaking the Board had no authority to adjudicate the legal issue with any finality. However, since it is obvious that the Board would have done so, it cannot be said that the plaintiff had no administrative remedy available. Whether or not the agency would entertain such an application after six years of silence by the plaintiff is not for this court to say. If the plaintiff had pursued its claim and persuaded an ultimate decision by the Board that direct drilling costs in a definite amount had been expended but that the plaintiff was not legally liable to its subcontractor and so could not maintain an action in the latter's behalf, finality would attach to the finding as to costs but not as to the liability over the subcontractor, and the latter question would then be reviewable by the court afresh on any kind of a record the parties offered. [fol. 59] In summary, the plaintiff is entitled to a trial before the court on the question of its delay damages involving the alleged postponement of its concrete pouring to the winter months as a result of its excavation difficulties, and no finality attaches to the adverse decision of the Board on this part of the plaintiff's pier drilling claim. But as to that part of the claim relating to excess costs of drilling the court's action is restricted to a determination of whether the decision below (if any) was arbitrary, capricious, or not supported by substantial evidence in the administrative record.

Concrete Aggregates Claim

The contract involved a large quantity of concrete construction. It provided that the contractor could purchase suitable aggregates from Government supplies or from other sources, but imposed no obligation on the plaintiff to purchase from the Government. The plaintiff elected to purchase aggregates from the Government. Early in the performance period (July 1953) it was discovered that the concrete initially poured was under strength, and that the dirty condition of the aggregate was at least partially responsible. Whereupon, the Government undertook to wash the aggregates to bring them

up to specification requirements. While this was being [fol. 60] done it directed the plaintiff to increase the strength of the concrete by adding one sack of cement in each cubic yard of concrete mix. This was done for several months until the condition of the aggregate improved to the point that adequate strength was obtained without using the extra sack of cement. Pursuant to plaintiff's request of July 31, 1953, for payment of the extra cement used as a changed condition, and plaintiff's later billing in February 1954 in the amount of $8,640.93 for the cost of the extra cement including "supervision, general expense, and profit", the defendant issued Modification No. 6, part of which reimbursed the plaintiffs in the amount it had claimed for this item. The contract was completed in January 1955, and it was not until July 1956 that plaintiff filed a claim with the contracting officer for approximately $109,000 for costs stated to have been incurred because of the poor condition of the aggregates.

The contracting officer rejected the claim on the grounds that it appeared to be one for breach of contract, not properly before him under the Disputes Article, and in the alternative that (1) the claim was untimely, and (2) the plaintiff had failed to explain the nature of the additional costs it was claiming.

[fol. 61] The plaintiff duly appealed to the AEC in January 1957 under Article 15 of the contract and requested a hearing.

In March 1957 the plaintiff executed a general receipt and release under which, for $52,382.92, it released the defendant from all claims "arising under, in connection with or by virtue of" the contract, specifically excepting certain enumerated claims including "Concrete aggregate claim for additional compensation to Contractor".

Under newly inaugurated procedures of the AEC the plaintiff's appeal was assigned to a Hearing Examiner. In May 1959 the contracting officer filed motions to dismiss the appeal proceeding for lack of jurisdiction [i.e., breach of contract], and failure to make timely presentation of claim, and filed a third motion for a more definite statement. A hearing was held before the Hearing Ex-

aminer on the motions. Subsequently the plaintiff filed a brief in opposition to the motions.

On October 1, 1959, the Hearing Examiner filed his decision which contained findings and determinations. The plaintiff's appeal was denied and the contracting officer's motion to dismiss for plaintiff's failure to make a timely presentation of its claim was granted. No hearing on the merits was held. The plaintiff did not petition the AEC for review of the Hearing Examiner's decision as provided in the Rules of Procedure in Contract Appeals (Sec. 3.30 and 3.31).

[fol. 62] The decision of the Hearing Examiner discussed all phases of the appeal, made specific findings of fact, and dismissed the appeal on the stated ground that the claim was not timely. However, the decision also observed that, although plaintiff had based its claim under the Changed Conditions Article, the article was not applicable because the condition of the aggregates was visible on inspection and hence was not an unknown condition. Moreover, if the plaintiff's theory was on breach of warranty of fitness of the aggregates, such a claim would not be within the jurisdiction of the AEC.

It must be concluded that the *Bianchi* decision does not apply to the claim for aggregates, primarily because the decision of the Hearing Examiner of the AEC was predicated upon oral argument of counsel addressed to dispositive motions, and was not based upon a hearing on the merits affording plaintiff an opportunity (as it had requested) to prevent evidence. Further, the Hearing Examiner disposed of the appeal on the stated ground that the claim was not timely in its presentation, although neither the contract nor any cited regulations prescribe a definite time for the filing of such claims other than the requirement of the Changed Conditions Article that notice of a claim thereunder be given immediately by the contractor. Whether a claim such as the present one, sounding in unliquidated damages, filed one and one-half [fol. 63] years after completion of performance under the contract is timely is a question involving the discretionary judgment of this court, assuming that in any event the agency has jurisdiction over such a claim. The

contracting officer felt that he had no such jurisdiction because the claim was for unliquidated damages.

If the claim was for unliquidated damages for breach of warranty that the aggregates were suitable and is thus beyond the jurisdiction of the agency, then three consequences ensue to the defendant's position:

(1) No requirement existed that the claim be appealed to the AEC.

(2) The defendant's argument fails that the plaintiff has failed to exhaust its administrative remedy by failing to seek a review by the AEC of the adverse decision of the Hearing Examiner.

(3) There need be no remand to the AEC to hold a hearing on the merits.

It is not specifically mentioned by the defendant in its brief, but in comparable situations the Government has urged that factual decisions by the agency underlying legal decisions over which the agency lacks jurisdiction, nevertheless possess finality on review by this court. In view of the rulings by the court in comparable situations any argument, if made, that the Hearing Examiner's decisions as to the facts possess finality, would not be tenable.

[fol. 64] The plaintiff is entitled to a *de novo* trial on the issue of concrete aggregates, and no finality attaches to the AEC decision on this item of the claim.

Shield Windows Claim

Under the original contract the plaintiff was to install shield windows to be furnished by the defendant. Shield windows were elaborate viewing apertures to permit personnel to watch developments inside specially insulated rooms, without radioactive leakage. They involved special seals and several thicknesses of special glass filled with fluid which would shield radioactive rays but not impede vision. Shortly after the award of the contract a Modification was issued requiring the plaintiff to furnish the shield windows by subcontract with a Government-approved supplier, and a subcontract was let to Corning, which was about the only supplier experienced in this

limited field. There is strong indication that during the performance of the contract the Government and its firm of Architect-Engineers had numerous conferences with Corning from which plaintiff was excluded, so that in practical effect (as the ABCA eventually found) Corning was more like a vendor to the Government than a subcontractor to the plaintiff, because of the latter's lack of effective control.

[fol. 65] The plaintiff experienced difficulties with the assembling and installation of the shield windows. In June 1954 the plaintiff notified the contracting officer that changed conditions had been encountered materially altering the scope of the work and forcing plaintiff to suspend all operations until the extent of the changed conditions was determined and the contract modified to reflect them. Specifically the changed conditions related to the Koroseal gaskets for the shield windows and the adequacy of the glass in the shield windows supplied by Corning according to specifications. The plaintiff contended that the design of the Architect-Engineer for the gaskets was faulty and that the defendant's Architect-Engineer was arbitrarily reading into the specifications requirements for selected window shield assemblies not called for by the leading authorities. The contracting officer denied the plaintiff's claim for relief and directed it to proceed, holding in effect that there was nothing wrong with the specifications for the Koroseal gaskets and glass for the shield windows. On July 23, 1954, plaintiff appealed to the AEC and requested a hearing which was held.

[fol. 66] On July 23, 1957 the AEC Advisory Board on Contract Appeals (ABCA) rendered its decision on plaintiff's appeal for a time extension, and equitable allowances for additional costs incurred because of the alleged changed conditions (apparently at some interim time the plaintiff had changed the nature of its claim from the form originally presented to the contracting officer). The Board considered the issue to be whether the plans and specifications were adequate to achieve the desired result, assuming the plaintiff's competence. Plaintiff contended that the delays it suffered were not its responsibility but were due in part to the AEC's arbitrary action

in bypassing plaintiff and in part to the arbitrary action of the Architect-Engineer and the Corning Glass Company.

At the conclusion of a remarkably thoughtful and sympathetic opinion the Board denied plaintiff's appeal for an equitable adjustment for increased costs but allowed the appeal for an extension of time for excusable delay, and remanded the latter to the contracting officer for computation. The question for remand became moot when the defendant extended the plaintiff's overall time to the actual contract completion date. The Board made a series of specific findings of fact which in effect put the blame for the series of delays on neither side to the exclusion of the other, and instead held that the delays were [fol. 67] chiefly the result of the inherent difficulties of assembling and installing shield doors and windows recognized to be beyond the knowledge and experience of any person or company, and which involved new techniques.

The Board findings enumerated the specific delays which apparently involved a substantial total of lost time. It does not appear in the decision that the plaintiff particularized or even totaled its claim for equitable adjustment, so it cannot be determined from the administrative record what part of its claim would be for direct costs reimbursable under the contract and what part (if any) would be delay damages. Assuming that, the Board would have had no jurisdiction to adjudicate a claim for delay damages (quite apart from the authority of the agency to *settle* such a claim), it is apparent that the basic issue involved in the administrative proceeding was whether the plaintiff was unreasonably delayed by actions of the Government, a typical delay damages type of inquiry sounding in unliquidated damages.

Accordingly, since the final settlement and release entered into on March 22, 1957 reserved plaintiff's claim for "additional compensation" covering the shield windows complaint, it is concluded that the decision of the Board lacks finality, that the *Bianchi* decision does not apply, and that the plaintiff is entitled to a *de novo* trial in this court on the question of delays. It is urged, however, [fol. 68] that the parties give full consideration to the

possibility of obviating or at least curtailing the trial by adoption of the administrative record, which includes many exhibits and a 453-page transcript of testimony taken during a three-day hearing. It may be that the requirements of the parties as to the facts of the claim may be fully satisfied in the existing record, and that they would merely want the court to reappraise the evidence *de novo* without any bar of finality to overcome.

Finally, the defendant alleges in its answer that plaintiff has failed to allege that the action of the Board was arbitrary, capricious, etc. Assuming that the Board had no jurisdiction over the type of claim it considered, such allegations in the petition would be superfluous.

Shield Door Claim

On January 28, 1955, the plaintiff submitted a claim of $4,457.25 to the contracting officer in the form of a proposal for a change order covering extra work on certain shield doors ordered by the Architect-Engineer a year earlier by means of changes made on shop drawings prepared by plaintiff's subcontractor. By a supplemental letter plaintiff asked for a time extension due to the delays involved.

[fol. 69] On October 27, 1955, the contracting officer denied the claim on the principal ground that the plaintiff had presented its claim a year late instead of within 10 days, as required by the Changes Article, and on the further ground that the changes made by the Architect-Engineer to the shop drawings did not change the contract drawings and specifications and thus constitute extra work. The plaintiff appealed to the AEC and a hearing was held before the ABCA. Through mistake no reporter was present to transcribe the testimony, but by agreement of the parties this was waived.

The Board made its decision on April 25, 1957, denying plaintiff's claim for adjustment under the changes clause but granting its claim for a time extension, remanding the latter to the contracting officer to determine the amount of the time extension. As to the major part of the plaintiff's claim the Board held that, while the contract drawings were inexcusably in error, the specifica-

tions themselves were adequate, so that the changes made by the Architect-Engineer to the subcontractor's shop drawings did not constitute changes under the changes clause. As to other changes, made by the Architect-Engineer to the subcontractor's shop drawings, the Board held that they did constitute changes to the contract drawings and specifications, but that the plaintiff's failure to present its claim within the 10-day period prescribed by the Changes Article barred any right to recovery, although the contracting officer had the discretion to consider such a claim but was not required to. The [fol. 70] Board then remanded the plaintiff's claim for a time extension to the contracting officer to determine the amount.

Three major points are to be made: First, the failure of the Board to prepare a transcript of its hearing prevents an adequate review by the court, and this lack is not cured because the plaintiff may have agreed to having no transcript made. The omission could be corrected by return of the claim to the Board for rehearing, but it is not believed that the *Bianchi* decision requires such a remand in every case where the prospect of even greater delay would be assured. The *Bianchi* decision must be read with discretion, and the Supreme Court's admonition against "delay at its worst" should be given consideration. To return the claim to the Board for a redetermination on the basis of a complete record would add perhaps several more years to the ultimate decision of a claim already 10 years old in its inception.

Second, it is observed that certain aspects of this item of claim might well have been subjected to a dispositive motion (if seasonably brought), such as the delay in presentation of the claim administratively and possibly the lack of authority of the Architect-Engineer, thus avoiding a trial.

Third, it is noted that at no time did the plaintiff claim administratively anything other than its direct costs, and made no claim for delay damages as it makes for the first [fol. 71] time in paragraph 7 (c) of its petition. On March 22, 1957, the plaintiff executed a full receipt and release with enumerated exceptions, including "Shield

Door Claim for additional compensation to Contractor". In view of the fact that the contracting officer was empowered to *settle* all kinds of claims (whether liquidated or unliquidated, sounding in breach of contract outside or inside the contract), it would seem that the plaintiff's failure to advance such a claim for settlement in the negotiations leading up to the final release would preclude the contractor from advancing it later as an afterthought. It would be a disservice to the contracting officer to permit a contractor to remain silent as to his potential claims while the parties are negotiating a final settlement, and then, after agreement is reached on a supposedly all-inclusive amount, the contractor reveals his new claims. The willingness of the contracting officer to enter into a final payment agreement would necessarily be substantially affected by his knowledge of delay claims, and if the contractor remains silent he is bound by his acceptance of the final settlement by way of accord and satisfaction. The particular reservation which the plaintiff inserted in the release in question would mean to the contracting officer only those direct costs relating to shield doors which the plaintiff had previously placed in issue, and would not include other aspects of the same claim [fol. 72] which plaintiff had held quietly in reserve. The precise situation was present in the recommendations for conclusions of law filed by this commissioner in *Brock & Blevins Company, Inc.*, v. *United States*, No. 292-59, on December 6, 1963, and the reasoning given there is incorporated here by reference.

In short, the plaintiff is entitled to a *de novo* trial on those shield door costs which it claimed administratively, but not as to any collateral delay costs which it advanced subsequent to the execution of the release on March 22, 1957.

Amercoat Paint Claim

In March 1954 it was discovered that various metal components furnished by defendant for the "hot shop" required de-rusting and painting with Amercoat. Plaintiff performed this work under protest, contending that it was outside of the painting specifications and involved

dismantling, sandblasting, etc. There was some disagreement as to whether Amercoating the shield doors should be considered as part of the plaintiff's obligation to Amercoat the "hot shop" walls. The contracting officer's decision in June 1954 that shield doors were movable walls and thus were contract obligations of plaintiff to paint was reversed in December 1954 by successor Government representatives, and the parties agreed to a settlement [fol. 73] formula as to the direct costs of the extra painting. It does not appear that the plaintiff made any administrative claim for delay damages in this connection as it is urging here. The defendant contends that plaintiff was paid in full for this Amercoating claim, and that the only reservation in the release executed by plaintiff in March 1957 was as to an amount withheld but subsequently paid to plaintiff for some defective paint work. The defendant also says that the present claim for extra work and changed conditions is not relevant to a breach of contract action.

Since the plaintiff did not advance its present claim for delay damages at any time prior to execution of the release in March 1957 and the sole claim reserved in the release was later paid, on the principle of accord and satisfaction the plaintiff should be barred from further recovery. The immediate issue is whether *Bianchi* applies to preclude a *de novo* consideration of the administrative decision, and the above observation as to accord and satisfaction is technically not relevant and should perhaps be the subject of an appropriate motion. However, since the object of the present proceeding is to ascertain what areas of the claim will require trial, it is relevant to rule that, for other reasons, a trial here should be denied and court review be limited to an examination of the administrative record.

[fol. 74] *Delay-damage Claim*

In paragraph 9 of its petition the plaintiff claims $1,100,965.23 for defendant's failure throughout the contract to (1) "formulate a desired end-result prior to the award", and (2) "prepare adequate plans and specifications", thereby "imposing additional design and extra

work through shop-drawing procedures". It was alleged as part of this claim that the defendant's procedure for approval of shop drawings was slow and compounded the effect of other delays. The allegations made in support of this item of claim, to the extent they can be understood, seem to amount in large part to a catch-all category overlapping to an unknown extent certain parts of the specific claims made administratively as described in other parts of this document. No such claim was made administratively at any time prior to the release executed in March 1957, and none of the exceptions in the release correspond to this claim. The claim itself appears to be one for breach of contract for delays and contemplates unliquidated damages (despite the precision of the amount claimed), so that it would not have been cognizable by the AEC even if it had been presented. But the fact that it had not been presented and was not excepted in the release would make its entertainment in a review proceeding in this court dubious, for reasons given as to [fol. 75] other specific claims. This is more properly a subject-matter for a dispositive motion rather than the present determination of the applicability of the *Bianchi* rule. To the extent any of the elements of the claim are duplicated in the specific claims as to which a *de novo* consideration has been recommended, they are not subject to the *Bianchi* rule and trial here should be accorded, but as to the balance presented for the first time in the petition in this case and never presented administratively, no trial should be allowed but a dispositive motion should be entertained.

/s/ C. Murray Bernhardt,
Commissioner.

February 18, 1964

[fol. 76]

EXHIBITS TO DEFENDANT'S SUPPLEMENTAL BRIEF

CONCRETE AGGREGATE APPEAL NO. 121, PART 1

UNITED STATES
ATOMIC ENERGY COMMISSION
P. O. BOX 1221
IDAHO FALLS, IDAHO

December 20, 1956

In Reply Refer To:

OC:WLR

Utah Construction Company
142 East Third South Street
Salt Lake City, Utah

Attention: Mr. Glen Staker

Gentlemen:

By letter dated July 16, 1956, you presented to me for decision as Contracting Officer under Contract AT(10-1)-645 your claim for additional compensation in the amount of $109,356.00, which sum you represent you were required to expend as a result of the "Commission's failure to furnish concrete aggregate that would meet the contract specifications". Inasmuch as all the work under the contract was completed and accepted January 7, 1955, my investigation of your claim has been restricted to (1) a review of the Commission's records and (2) discussions with those few Commission and Ralph M. Parsons Company employees presently in the vicinity of Idaho Falls who had any connection with the work being performed under Contract AT(10-1)-645. As a result of that limited investigation I have made the following findings and determinations in accordance with the provisions of Article 15. of the contract entitled "Disputes" and Section 3.10 of the Rules of Procedure of United States Atomic Energy Commission Advisory Board of Contract Appeals (10 C.F.R. Chapter 1, Part 3). A copy of those rules is attached for your convenience.

FINDINGS

1. On March 19, 1953, the Government and the Utah Construction Company entered into Contract AT(10-1)-645 for the performance of certain construction work.

2. SC-18. *Concrete Aggregate* of Section II—Special Conditions of that contract provides, in part, that "Concrete Aggregate suitable for all standard portland cement concrete requirements on this job will be available to this Contractor at the price of $2.90 per ton from the Commission's stockpile near the ANP Area".

Registered Mail
Return Receipt Requested

[fol. 77] 3. The Contractor's July 16, 1956 claim for additional compensation is predicated on a failure of the Commission to make available suitable concrete aggregate in accordance with the provisions of SC-18 of the contract and is therefore a claim for damages for an alleged breach of contract by the Commission which is not properly before me for consideration under the Disputes Article.

DETERMINATION

It is my determination from the above findings that your claim is one for damages for breach of contract which cannot properly be considered under the Disputes Article. Nevertheless, I make the following additional findings of fact, without prejudice to this determination, in order to insure compliance with Section 3.10 of the above-referenced Rules of Procedure.

FINDINGS

4. Utah was not required by any provision of the contract to use the concrete aggregate which the Commission made available and SC-21 of Section II—Special Conditions of the contract applies only to mandatory Government-furnished property.

5. Cylinder tests conducted during June and July indicated the concrete being placed on the ANP Project

varied greatly with respect to compressive strength and that some of the concrete did not meet the minimum strength requirements established by Table 3A of Division S-2 of the Technical Specifications.

6. Utah claimed the wide variation in the compressive strengths of the concrete being placed on the ANP Project and the failure, in several instances, of the concrete to meet minimum strength requirements was due to the fact that the concrete aggregate which was being made available by the Commission was "overburdened with fine materials and seriously deficient in the coarser parts".

7. Tests made during July 1953 of the concrete aggregate being made available to Utah by the Commission revealed that the percentage of concrete aggregate passing the smaller sized screens exceeded the allowable percentages set forth in the gradation tables contained in Division S-2 of the Technical Specifications of the contract.

8. By letter dated July 21, 1953, over the signature of J. Warren Evans, Chief, Construction Branch, the Commission authorized Utah to increase the "five (5) sacks of cement per cubic yard as outlined in Section III, Division S-2, Page 7 in subparagraph (2), under paragraph b. 'Proportioning Limitations', to six (6) sacks of cement per cubic yard" pending an investigation and determination of the deficiencies in the strength of "recent concrete placed on the ANP Project".

[fol. 78] 9. By letter dated July 31, 1953 over the signature of Glen Staker, Project Manager, Utah notified the Commission that it regarded the poor quality of the concrete aggregate being "furnished" by the Commission as a changed condition under its contract and that said letter was to be regarded as notification of that changed condition.

10. The only monetary relief requested by the Contractor in its July 31, 1953 letter was payment for the additional cement used in making concrete if the Commission decided to utilize the existing concrete aggregate with the additional of one extra bag of cement per cubic year of concrete mix.

11. Utah was authorized and did use one extra bag of cement per cubic year of concrete mix placed on the

ANP Project from July 21 to October 30, 1953, by which time another Contractor had substantially completed reprocessing the 1-1½" to ¾" coarse concrete aggregate.

12. By letter to the Commission dated February 7, 1954, Utah presented its cost for adding the one bag of cement per cubic yeard of concrete mix from July 21 through October 30 which cost, including supervision, general expense, and profit, totaled $8,640.93.

13. By item 3 of Modification No. 6, which was executed without protest by Utah, the contract was modified to provide that the Contractor should furnish and add to the concrete mix one bag of cement to each cubic yard of structural concrete placed under the contract between July 21 and October 30, 1953, as directed by the Resident Engineer, in consideration of payment to the Contractor of an additional $8,640.93.

14. Although any failure of the Commission to make available suitable concrete aggregate under the contract would constitute a breach of contract rather than a changed condition as alleged in Utah's July 31, 1953 letter, Utah received all the monetary relief requested in its July 31, 1953 letter, which relief fully compensated the Contractor for the matter brought to the Contracting Officer's attention by its July 31, 1953 letter.

15. Although the concrete aggregate made available by the Commission may well have been a contributing factor in the production of below strength concrete by Utah, it was not the sole cause of that condition.

16. Although the Contractor's July 16, 1956 claim for additional compensation is predicated on the Commission's failure to make available concrete aggregate of the proper quality, as was its July 31, 1953 claim, the former is in fact a separate and distinct claim which had never been mentioned or presented to the Contracting Officer for consideration prior to July 16, 1956.

17. The submission of the Contractor's July 16, 1956 claim was not timely and the delay in presenting such claim has acted to the prejudice of the Commission in the investigation of the claim, especially with respect to [fol. 79] making findings as to whether the concrete aggregate made available by the Commission did in some way cause an increase in the cost of finishing the con-

crete placed on the ANP Project and the extent, if any, to which the increased cost alleged by the Contractor was attributable to the concrete aggregate used.

18. Utah has not indicated the nature of the additional costs alleged to have been incurred, nor has it indicated, even in a general manner, how the concrete aggregate made available by the Commission was responsible for an increase in the cost of finishing the concrete.

19. The sole support for Utah's July 16, 1956 claim consists of (i) a computation which indicates that Utah's actual concrete finishing costs exceeded its estimated concrete finishing costs (with a contingency factor of 50 per cent) by $109,356.00, and (ii) a bare allegation that the Contractor was forced to expend that entire sum because the Commission failed to "furnish concrete aggregate that would meet the contract specifications".

20. Utah has not submitted evidence in support of its July 16, 1956 claim which would justify my finding that Utah incurred any additional cost for finishing concrete placed on the ANP Project as a result of the quality of concrete aggregate made available by the Commission.

DETERMINATION

As previously stated, it is my determination that your July 16, 1956 claim is a claim for damages for breach of contract which is not properly before me for consideration under the Disputes Article. However, even if that determination were overruled, it is my further determination in view of findings 4 through 20 that your July 16, 1956 claim must be denied in its entirety.

Very truly yours,

ALLAN C. JOHNSON, Manager
Idaho Operations Officer
Contracting Officer

Enclosure:

Rules of Procedure

OC	E&C	USAF	E&C	M
WLRowberry:jm	Ashton	Heasley	Leppich	Johnson

12-20-56

[fol. 80]

CONCRETE AGGREGATE APPEAL NO. 121, PART 2

UNITED STATES ATOMIC ENERGY COMMISSION

HEARING EXAMINER
FOR
CONTRACT APPEALS

Docket No. 121

APPEAL OF UTAH CONSTRUCTION COMPANY
UNDER CONTRACT NO. AT(10-1)-645

Brief of the Contracting Officer on Motion to Dismiss Utah's Appeal for its Failure to Make a Timely Presentation of its Claim

This brief is submitted on behalf of the Contracting Officer, United States Atomic Energy Commission (hereinafter referred to as the "Commission"), Idaho Operations Office, Idaho Falls, Idaho, in support of his motion to dismiss the appeal of UTAH CONSTRUCTION COMPANY (hereinafter referred to as the "Contractor") for failure to submit its claim for additional compensation due to alleged increase in concrete finishing costs for approximately *three years* after the Contractor submitted its notice of a "changed condition" and for approximately one and one-half years after all work under the subject contract had been accepted.

FACTUAL SUMMARY

In the instant case the alleged changed condition was encountered on July 16, 1953. By letter dated July 21, 1953 the Commission directed the Contractor to add an extra bag of cement to the concrete mix "pending an in-

vestigation and determination of deficient strengt
quirements . . ." (Encl. 7 of Record on Appeal, h
after termed "Record"). Tests revealed that the
crete being placed did not comply with the strengt
quirements of the contract (Encl. 8, Record). On
31, 1953 the Contractor transmitted to the Comm
its "notice" of a "changed condition" (Encl. 10, Re
The *only* monetary relief requested in this letter of
31, 1953 was for the cost of adding an additional b
cement.

[fol. 81] The Commission concluded its investig
(see Encls. 11 and 12, Record), and decided to co
the addition of the extra bag of cement until cert
the concrete aggregates had been screened to elim
the excess fines. This was done under a contract
another contractor (Encl. 17, Record), after the
tractor refused the job (Encl. 15, Record). After c
of the aggregates were screened, the Commission'
thorization to use the extra bag of cement was re
(Encl. 18, Record). Thereafter, the Contractor subm
its costs for the extra bag of cement (Encl. 20, Re
saying *nothing* with respect to any other costs
might be incurred in the future or which were then
incurred as a result of the alleged "changed condi
Acting in good faith, on the basis of the Contractor's
representations and incidations that it desired reim
ment only for the added bag of cement, the Comm
agreed to the Contractor's proposal and entered
Modification No. 6 to the subject contract which pr
for payment for the added bag of cement in the a
requested by the Contractor (Encl. 5, Record).
after, the Commission continued its regular course o
duct, relying on the fact that Modification No.
finally disposed of the entire controversy surroundi
quality of aggregate and the Contractor's claim
thereon. It was not until approximately *three*
after the controversy concerning the aggregates
that the Commission was made aware of the instant
purportedly based on facts arising out of this sam
troversy.

LEGAL ANALYSIS

In the *Appeal of Frontier Drilling Company*, USAEC-BCA, Docket No. 93 (Nov. 1956), the AEC's Advisory Board of Contract Appeals stated:

> "Unlike other articles of the standard contract, where the notice requirement serves only to insure a review of the claim while evidence on the merits is available, the requirement in Article 4 serves a second function. Extra costs involved in the Changes and Delay-Damages situations have already occurred; but in the Changed Condition situation the Contracting Officer may, given immediate notice, not only discover the true facts, but, *if he so desires, prevent or reduce the* [fol. 82] *costs by appropriate change orders.* It is for this reason that the Board ruled in Appeal of McKee, Docket No. 10, that *the notice under Article 4 must not only warn of the condition but of the intent to claim extra costs.*" (Emphasis added.)

In the *Appeal of Utah Construction Company*, USAEC-BCA, Docket No. 95 (April 1957), the Board stated:

> "In general it is true, as the Board has said in other opinions, that the primary purpose of early notice is to afford the Contracting Officer an opportunity to ascertain the facts while they are fresh, and that, therefore, if the facts can still be determined, a late claim should be decided on its merits. However, we have recognized an additional purpose in early filing of claims under the 'Changed Condition' article—*namely an opportunity to mitigate damage by deletion of, or changes in, the work required.*" (Emphasis added.)

It is quite apparent that since the Contractor in the instant case did not present the subject claim for approximately *three years* after it had submitted its notice of a "changed condition", the Commission was not afforded the opportunity to mitigate damages, if any. The Board's interpretation of the notice requirement in the aforecited cases finds clear-cut and convincing support in the two equitable theories of estoppel and laches.

The instant case presents the classic case for the application of the principles of equitable estoppel. One of the

many facets of the doctrine of equitable estoppel is that of acquiescence. In *Harvey Radio Laboratories, Inc.* v. *The United States*, 126 Ct. Cl. 383, 391 (1953), the court stated:

> "When a party with knowledge or the means of knowledge of his rights and of the material facts does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or abstains for a considerable length of time from impeaching it, so that the other is reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, though it be originally impeachable becomes unimpeachable."

[fol. 83] In *Mahoning Investment Co.* v. *United States*, 78 Ct. Cl. 231, 247 (1933), the court stated:

> "All that is shown in these cases [of acquiescence] is that the acts of the party estopped were such as to mislead the party claiming the estoppel to continue in the course already begun, believing the same to be acceptable to the party estopped."

It is clear that the Contractor had means of knowledge of its rights since it had previously filed a claim pursuant to Article 4 of the General Provisions of the contract, and since it obviously had complete and sole control of its cost records, including the costs of concrete finishing.

From the period of July 16, 1953 until February 5, 1954 the only subjects of discussion between Contractor and the Commission with respect to the entire controversy were the strength aspects of the concrete and the Contractor's sole monetary claim, which was for the additional bag of cement. On February 5, 1954 the Contractor and the Commission entered into Modification No. 6 to the subject contract which finally disposed of the Contractor's claim. There would seem to be no question but that the Contractor recognized the contract modification as disposing of its only monetary claim and that it permitted the Commission to believe that the modifica-

tion had finally disposed of the entire controversy. This latter proposition is particularly compelling since the Contractor abstained for approximately two and one-half years (from February 1954 to July 1956) from impeaching the contract modification as not being dispositive of the entire controversy.

In *Joseph Behr & Sons, Inc.* v. *The United States*, 137 Ct. Cl. 688, 689 (1957), the plaintiff had purchased certain war surplus materials from the Government. The plaintiff claimed that there was a shortage in certain items and made a claim therefor which was subsequently satisfied. More than a year after the sale had been [fol. 84] consummated the plaintiff claimed that additional items were missing and claimed $25,387.80 therefor. The court stated:

> "In the first place, we think it is estopped to assert the claim sued on. When it presented its claim for the shortage of cots and the saw, and for pilferage from the trucks, it made no mention of the alleged shortage for which it now sues, although it says it knew of them at the time. And when it later paid the balance of the purchase price, less the amount claimed for the cots and the saw and the pilferage from the trucks, it deducted nothing for the items for which it now sues, and made no mention of them.
>
> "When claim was made on account of the cots, the saw, and the pilferage from the trucks, defendant sent its agent McMillen to Maui to investigate, but he made no investigation of the alleged shortage now asserted, because no claim with respect thereto had then been made. When, more than a year later, the present claim was first asserted, plaintiff had disposed of all of the goods and no investigation was possible.
>
> "Under such circumstances, we think plaintiff has waived the claim on which it sues, and is estopped from asserting it."

It is noted that in the instant case the Commission made an investigation concerning the strength requirements of the concrete as they were affected by the quality

of aggregate but no investigation was made with respect to the claim now asserted, because no claim had then been made. If the Contractor, within a reasonable time after it had given its "notice" of a "changed condition" had also notified the Commission that the quality of aggregate furnished by the Commission was causing an increase in finishing costs, the Contracting Officer could have made an investigation with respect to the finishing costs, and if he found the Contractor's allegations were true, and that the same constituted a "changed condition", he could have prevented or reduced the costs by appropriate change orders or other action. *Appeal of Frontier Drilling Co.; Appeal of Utah Construction Co., supra.* To presently allow the Contractor to assert its claim would clearly result in prejudice and injury to the Commission, since the Contractor has precluded the Commission from preventing or reducing the damages, if any. [fol. 85] The doctrine of laches is substantially similar to the doctrine of estoppel. It is generally stated that a claim will be barred on the ground of laches where there is a delay in asserting the claim; lack of knowledge or notice on the part of the defendant that the claimant would assert such a claim; and a injury or prejudice to the defendant in the event the complainant's claim is allowed; e.g., *Galliher* v. *Cadwell*, 145 U.S. 368, 372, 373 (1892); *Southern Pac. Co.* v. *Bogert*, 250 U. S. 483, 488, 489 (1919); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). The fact that there was a delay in asserting the claim for approximately three years after the notice of the changed condition readily appears from a reading of the Contractor's notice of a changed condition dated July 31, 1953, the Contractor's present claim dated July 19, 1956 and the affidavit of the Contracting Officer and the acceptance of work (which documents are attached to the subject motion). The affidavit of the Contracting Officer also states that the Commission did not have notice or knowledge of the Contractor's present claim prior to July 19, 1956. As heretofore stated, the delay by the Contractor in submitting its present claim has acted to the prejudice of the Commission.

CONCLUSION

The conclusion seems inescable that the Contractor did not comply with the notice requirement of the "Changed Conditions" article since the Commission was not afforded the opportunity to mitigate damages, if any; that the Contractor acquiesced in the proceedings to dispose of the only monetary claim which it had presented, inducing the Commission to believe that no further claim would be presented; that the Commission has been prejudiced thereby; that the Contractor "slept on" its present claim for an unreasonable period of time; and, therefore, the Contractor is estopped from asserting its present claim or barred therefrom by reason of laches or precluded therefrom by reason of Article 4 of the General Provisions of the contract.

[fol. 86] To allow a contractor's claim under circumstances similar to the instant case would set a precedent which would make a farce out of the notice requirement of the "Changed Conditions" article. A contractor could submit an initial notice and claim and then, after all the work was completed, he would be allowed to "re-open" his original claim to include any costs which he "feels" are attributable to the "changed condition", thereby entirely precluding the Contracting Officer from mitigating damages, if any, and requiring its claim to be judged on the basis of facts which, if they exist at all, are entirely inadequate due to the passage of time; and, in the case of subsurface conditions, such facts are literally buried. As the Supreme Court of the United States stated in *Dickerson* v. *Colgrove*, 100 U.S. 578, 581 (1880):

> "There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on."

Therefore, it is respectfully requested that the Contracting Officer's motion be granted.

DISPOSITION OF THE MOTION

Without prejudice to any other motion the Contracting Officer might present, it is respectfully requested that the Hearing Examiner make a full disposition of this motion prior to taking any other action with respect to this appeal. It is the position of the Contracting Officer that this motion *is* dispositive of the appeal and, therefore, will preclude the necessity of a hearing on the merits.

/s/ Howard K. Shapar
Attorney for the Contracting Officer
USAEC, Idaho Operations Office
Iraho Falls, Idaho

[fol. 87]

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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Docket No. CA-121

IN THE MATTER OF THE APPEAL
OF
UTAH CONSTRUCTION COMPANY
UNDER CONTRACT NO. AT(10-1)-645

Appearances

Gardner Johnson, Esq. for
Utah Construction Company

Howard K. Shapar, Esq. and W. L. Rowberry, Esq. for
The Contracting Officer of the Atomic Energy Commission

DECISION—October 1, 1959

Utah Construction Company of Salt Lake City, (Utah) executed a contract on March 19, 1953 with the United

States Atomic Energy Commission and was therein designated as "Contractor" to construct a large assembly and maintenance area at the Commission's National Reactor Testing Station in Idaho. Among other obligations, it was contemplated that Utah would pour approximately 18,000 cubic yards of concrete.

Upon completion of that work, in so far as herein material, a dispute has arisen between the Contracting Officer and Utah concerning the availability, suitability, and use of certain aggregates for cement which were utilized in the performance of this part of the contract. Utah contends that the aggregates were required to be furnished by the Government and its claim is based upon alleged changed conditions as that term is defined in the standard changed conditions clause. The contract contained many of the standard provisions of Government contracts, but it also contained special terms pertinent to this work. [fol. 88] Some of the important clauses are as follows; others are set forth later in the decision where detailed attention is directed to them.

> "Article 1. Statement of the Work. The contractor shall furnish (except as the specifications may otherwise provide) the plant, equipment, labor and materials and perform the work necessary for the construction . . . . in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications, Invitation No. AT(10-1)-645, ...
>
> "Article 4. Changed Conditions. Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed. The Contracting Officer shall there-

upon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall . . . be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions."

The acceptance of the bid provided:

"In compliance with your Invitation for Bids No. AT(10-1)-645, dated December 22, 1952, the undersigned hereby proposes to furnish the plant, equipment, labor and materials (except as the specifications may otherwise provide) and perform the work. . . ."

The specifications of the general conditions for the construction contract provided, in part:

"GC-11. It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the nature and location of the work, the character, quality, and quantity of the materials which will be required . . . . and all other matters which can in any way affect the work under the contract.

"GC-18 *Claims for Extras.* The Contractor shall, when ordered in writing by the Commission, perform extra work and furnish extra material . . . shall be paid for at actual necessary cost as determined by the Commission, plus 10% for superintendence gen-
[fol. 89] eral expense and profit. The actual necessary cost will include all expenditures for material, labor, including compensation for insurance and social security taxes, and supplies furnished by the Contractor, and a reasonable allowance for the use of the plant and equipment where required, this allowance to be agreed upon in writing before the work is begun, but will, in no case, include allowance for office expenses, general superintendence or other general expenses."

A special condition respecting concrete aggregate was:

"SC-18. . . . . Concrete aggregate suitable for all standard portland cement . . . aggregate require-

ments on this job will be available to this Contractor at the price of $2.90 per ton from the Commission's stockpiles near the . . . Area.

. . . . .

Approximate quantities of various gradations available in the concrete aggregate stockpiles are as follows:

. . . . . .

This Contractor shall assume full responsibilty for the total 50,000 tons of stockpiled aggregate and shall make his own arrangements for all loading and handling in connection with his concrete batching operations. . . .

While Utah occasionally refers to the aggregates as Government-furnished materials, Special Condition 20 for the contract describes Government-furnished materials as requiring special agreement for—

". . . Government-owned materials held in storage by the Commission at the . . . Station . . . Subject to the right of the Contractor to inspect and reject the materials for good and sufficient reason prior to acceptance, the Contractor shall reecive such materials in their then condition, without warranty expressed or implied on the part of the Commission as to serviceability or fitness for use."

Uath filed a claim approximately a year and a half after the work was completed and accepted, and sought approximately $109,000 for costs stated to have been incurred because of the poor condition of the aggregates. The Contracting Officer rendered his decision and found [fol. 90] that the claim appeared to be one for breach of contract over which he had no jurisdiction, and, in the alternative, he found that the appeal did not involve a changed condition within the contemplation of that clause of the contract, and finally that there had not been a timely presentation of the claim. An appeal having been taken from that decision in accordance with the Rules of the Commission for procedure in contract appeals, the Contracting Officer filed 3 motions: (1) to dismiss for failure to make a timely presentation of the claim; (2)

to dismiss for lack of jurisdiction, because either (a) the asserted claim is not within the terms of changed conditions clause of the contract, or (b) the asserted claim is for unliquidated damages; and (3) for a more definite statement of the claim.

An oral argument was held in Idaho Falls, Idaho on June 9, 1959, on these motions and briefs in support thereof, after which the Contractor filed an answering brief on July 23, 1959 and the Contracting Officer filed a reply brief on August 28, 1959.

It appears without dispute that sometime prior to July 17, 1953, the Contractor commenced work, and that on July 17 the Contracting Officer, through the Chief of the Construction Branch, suspended a portion, at least, of the concrete mixing and pouring in view of information received by him through tests that the cement mixture when placed in cast compression cylinders was deficient in the strength requirements as specified by the contract. On July 21, 1953, the Contracting Officer authorized resumption of work and stated that ". . . . pending an investigation and determination of deficient strength requirements, . . ." Utah was authorized to increase the concrete [fol. 91] mix by one bag of cement thereby increasing to 6, instead of the originally specified 5, bags of cement per cubic yard. From this point on in the transaction there appears to be a difference of views as to the cause of the deficient strength in the poured concrete and the costs involved in the full correction of that condition.

The substance generally designated as "aggregates" used by Utah in the concrete mix was located in a pile on the site of the Reactor Testing Station, and was nearby to the location where the mixing of cement and aggregates occurred, and also near to the place where it was poured into final form. After the information had been received that there was a deficiency in the strength requirements, tests were then undertaken of the aggregates. These revealed the presence of small sands, or "fines" which may have contributed in some way to the problems of deficiency in the strength requirements.

After this discovery, the Contracting Officer undertook the cleaning of the aggregates to remove this condition.

This was done through another contractor selected for this single purpose and at cost to the Contracting Officer of $7,744. The provisions of the applicable specifications respecting cement mixtures contain detailed definitions of fine and course aggregates, and directions as to permissible limits of deleterious substances and organic impurities as well as strength requirements in a concrete mix. The proportioning limitations, as mentioned, first provided for 5 sacks of cement per cubic yard, but this was changed, when it was determined that the cement mixture produced by the Contractor was deficient in strength, to 6 sacks per cubic yard. The contract pro-[fol. 92]vided authority for this change in proportioning of the cement mixture under this clause, S2-03 (c):

> "(1) *Changes by Engineer* may be made during progress of work should it be found impracticable to obtain concrete of required workability and strength with materials being furnished by Contractor; in such cases, changes in proportions or materials or both, may be made as necessary to secure required results."

Utah, in its appeal, relies upon 2 of its letters addressed to the Atomic Energy Commission; one written July 23 and one on July 31, 1953 in reference to this deficient strength condition being due to the condition of the aggregates. The first letter states, among other things that: "a visual examination of the aggregate piles reveals .... clean aggregate free from these objectionable small fines while in the center . . . the aggregate is coated together by these fines . . ." This letter also referred to the Commission's directive to add a bag of cement with the comment: "We . . . will expect to be reimbursed for the total amount of cement used in excess of the regular five (5) bag limit." And further, the letter concluded: ". . . . since the aggregate furnished by the AEC, which we are required to use under the terms of the contract, does not in any classification meet the specifications set up by the contract, we cannot be responsible if the result in concrete does not live up to the requirements . . . we request that steps be taken immediately to furnish us with concrete aggregates that will meet the specifications."

The letter of July 31 had similar conclusions . . . "immediate steps be taken to furnish us with aggregates . . ." and, further, ". . . this letter our formal notification that materially changed conditions have been discovered in the quality of the aggregate . . . furnished by the AEC. More importantly, this letter requested 4 things: "If the AEC [fol. 93] does not elect to furnish us with . . . . aggregate which will meet the specifications set forth in Paragraph S-2-02 [1] of the Structural Concrete Specifications:

1. The contract be modified and that compliance with this section of the specification be waived.
2. The modifications show that this waiver is being made at the request and for the convenience of the Atomic Energy Commission.
3. If it is the decision of the Atomic Energy Commission that the present aggregate be utilized by the addition of one extra bag of cement per yard of concrete mixed, that the same be considered an additional expense to the contractor above and beyond the original scope of the contract, which shall be a fully unquestioned reimbursable item.
4. The modification relieve the Contractor from any responsibility for unsatisfactory conditions that may result from the use of the present deficient aggregate.

The direction for the addition of one bag of cement was effective from July 21, 1952 to October 30, 1953; after this latter date the mix was in accordance with the original specifications of 5 bags per cubic yard. By a report dated November 6, 1953, tests revealed that after the cleaning by the other contractor, the aggregates were determined to be unusually clean.
[fol. 94] Following these events, Utah, on February 9, 1954, referring to (a) the direction to use an extra bag of cement, and (b) its own letter of July 23 requesting reimbursement, submitted a statement in the amount of $8,640.00, which included provisions for the cost of cement and for its "Supervision, *General Expense*, and Profit."

[1] S2-01 of this Division of Technical Specifications provides in part: "SCOPE: The Contractor shall furnish all . . . material . . . to complete all structural concrete."

(Underlines added) This statement was paid by the Commission as reflected by Modification No. 6 to the contract, which is particularly important in that it not only paid the aforesaid claim, but embraced many other items which related to other phases of the contract, such as hot shop tunnel in a building, locomotive pit, flushwood door, etc. The modification recited that the parties agreed to modify the contract "in the following particulars, but in no others;" and then followed with the one payment of $8,640.03 for the transaction in reference to the cost and general expense in adding a bag of cement per yard.

The record in this case also reveals that the Commission engineers become dissatisfied with the rate of progress by Utah in completing the contract, and expressed its dissatisfaction in a letter dated March 29, 1954. At or about the same time, Utah claimed an extension in contract performance time was due because of various matters not related to the structural concrete portion of the work, and in 14 additional modifications of the contract which were executed in November 1954 and which provided for additional payments, the AEC reserved its rights to contend that the contractor had not fulfilled the performance within the specified time, and likewise, Utah specified that its extension of time claim would be con- [fol. 95] tested in Appeal No. 91. Utah made no other reservation respecting any other claim or contention in any of these 14 modifications, and until July 19, 1956, Utah never communicated in any way respecting its endeavor to claim further sums on account of the bag of cement transaction. In fact, the communications in this record subsequent to July 1953 respecting structural concrete, indicated that engineers had determined that Utah was not mixing the aggregates thoroughly, nor long enough. In any event, on July 19, 1956, Utah wrote a letter stating that it claimed $109,356, which is stated to be due because the Commission failed to furnish suitable aggregates to Utah and it ". . . was forced to expend an additional sum of $109,356.00, as fully shown in the attached enclosures . . ."[2]

[2] It was also to this enclosure that the Contracting Officer's motion was directed to have a more definite statement. The enclosure

After the hearing of the oral argument, Utah stated that it rested its case upon its allegation that the situation in reference to the aggregates was "an unknown condition[3] of an unusual nature differing materially from that ordinarily encountered or generally recognized as inhering in work of the character provided for in the plans and specifications."

This recitation of these several facts has been made because it appears to be clear that Utah has failed to promptly notify the Contracting Officer of any claim it might have in relation to the condition of the aggregates. [fol. 96] In fact, it would seem that Utah might be considered to have misled the Contracting Officer by filing a claim in 1956 after requesting certain specific action in its letter of July 31, 1953 which the Contracting Officer fulfilled by cleaning the aggregates,[4] and by making the requested payment not only for the extra bag of cement, but also the "general expense" in connection with it. This payment alone, of one general expense claim, while not stressed at the hearing or in the motion papers, could be construed as settlement of an account stated, which would of itself bar any further claims. The statement of an item in an account or claim, followed by the payment thereof, operates to eliminate controversy in reference thereto.

Reed v. Thomas, 134 Kans 849, 8 Pac 2nd 379
See: Restatement of Contracts, Sec. 422
Williston on Contracts, Sec. 1862
84 A. L. R. 114

In any event, the determination of a timely filing or conversely, an untimely one, must depend upon the vary-

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set forth a computation of cost for a certain quantity of concrete mix, not identified for the time period involved as compared with an estimate of a normal cost.

[3] This claim of lack of knowledge is to be contrasted with the statement in Utah's July 23, 1953 letter that: "A visual examination of the aggregate pile . . reveals . ." coupled with its certification at the time of its bid that it had visited the site, and also its agreement that it understood the quality of materials required.

[4] The obligation of the Contracting Officer to do this is not clear.

ing circumstances of particular cases.[5] In some instances, perhaps a filing made 2 months after an incident alleged to give cause to additional expense would be untimely, in others, maybe a year after an event would be considered timely. Whatever be the time interval, however, two aspects of a filing are fundamental, (a) the filing must give the Contracting Officer time to mitigate the extent [fol. 97] of the claim, if possible, and (b) the asserted claim must indicate an intention to claim a dollar amount. This latter element, of course, excludes both the July 23 and July 31, 1953 letters from being sufficient.

Appeal of Frontier Drilling Company, USAEC-BCA DOCKET NO. 93 (1957)

The Contracting Officer contends that while consideration of laches and estoppel are distinct, yet the necessary ingredients of both are present here. While those matters might be more fully developed on a record if this case were heard on its merits, it is concluded that there is not any need to do so for the untimely character of the 1956 claim, which was the first indication of a dollar amount,[6] seems readily apparent from the circumstances surrounding this transaction shown in the present record. The filing in 1956 was made approximately three years after the letter describing a changed condition, and approximately one and one half years after all work under the contract had been accepted.

The Contracting Officer also argues further that to consider specifically the basis urged by Utah for its claim shows equally conclusively that the changed conditions clause has no application. The initial facet of Utah's contention that the condition of the aggregate was unknown at the time of the contract was executed in March,

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[5] The changed condition clause of the instant contract requires notice to be given *immediately* by the contractor; if the July 1953 letters are the basis of the appeal, the claims there made were paid; if the 1956 letter is the basis, the time interval is more than usual and no justification for late filing was given.

[6] Other than the statement of February 9, 1954, specifying cement costs and general expense, which was paid.

1953 appears directly contrary to Utah's admission 4 months later that even a visual examination of the stockpile showed excessive "fines". Utah also urges that the condition of the stockpile was as fathomless as if the needed aggregates were underground and test borings would lend no aid as to their character. Utah, in fact, stated at the oral argument that it believed there was not any difference here whether the aggregates were above [fol. 98] ground or underground, apparently regardless of what the visual examination revealed. The Contracting Officer also contends that the standard changed condition clause applies generally to an unknown underground condition related specifically to the main objective of the work to be accomplished, such as an excavation needed for footings for a building contracted to be constructed. For those situations, however, of conditions that are readily observable the Contracting Officer contends the relief under a changed conditions clause is not available, and while a hearing on the merits might better enable the Contracting Officer to present the factual support for this contention, the disposition of the claim as untimely obviates a determination of that phase of his contention. Likewise, if Utah argues that the description of the aggregates as "suitable" implied any warranty as to condition, or fraud in that representation, the remedy for unliquidated damages is beyond the jurisdiction of this proceeding. Suffice it to say, however, that Utah rests its case upon the changed conditions clause and the facts relied upon by Utah do not support that view. Utah also urges that this case be set down for hearing on the merits to permit Utah to expand this presentat n, but the substance of Utah's claim is in the existing record. If the condition of the aggregates was observable upon a "visual examination", it must be presumed that Utah, the bidder, when it visited the site, looked at what there was to see.[7] Credence must be given to Utah's admission that it could see the "fines" that may have caused, but it is not certain that

[7] The contractor was to be charged with such knowledge of the physical conditions of the site as could have been gained by a reasonable site investigation. Bailey-Lewis-Williams of Georgia, Inc., ASBCA No. 4997, Army Appeals Panel 59-1, 5-11-59, BCA-2225.

that alone caused the deficiency in strength of the concrete mix.

[fol. 99] The foregoing determinations make it unnecessary to resolve the Contracting Officer's motion for a more definite statement by Utah of the portions of the Contracting Officer's decision from which the appeal is taken.

In addition to the foregoing findings and determinations, the Hearing Examiner *finds*:

1. Utah Construction Company (Utah), a Utah Corporation, was the contractor, as designated in a contract executed on March 29, 1953 with the United States Atomic Energy Commission for the purpose of constructing a large assembly and maintenance area at the Commission's Reactor Testing Station in Idaho.
2. Utah duly entered upon the performance of that contract which included the construction of several buildings, many appurtenant facilities, as well as the pavement of a large area with a concrete mix specified to be laid according to a formula comprising ingredients in proportions detailed in the contract, and including concrete and aggregates.
3. The contract contained a provision respecting the availability of aggregates which were described as suitable, as quoted in the foregoing findings, but did not impose any obligation on Utah to use those aggregates nor on the Commission to furnish them.
4. The condition of the aggregates or the use of that portion thereof containing excessive fines in the [fol.100] concrete mix and in part causing a deficiency in the strength requirements was corrected by the addition of an extra bag of cement as directed by the Commission's engineer on July 17, 1953.
5. The Commission never held Utah responsible for the condition of the concrete mix having a defiency in the strength requirements.
6. Utah requested additional payment for the addition made by it to the concrete mix between July 21, 1953 and October 30, 1953 and the Commission paid the amount designated in the Utah statement

which included provisions for both the added cement and also for general expense as computed by Utah.

7. The Government warranty for Government-furnished material provided for the performance of the contract did not extend to the aggregates utilized by Utah.
8. The requests made by Utah in its July 17 and July 31, 1953 letters, after the direction to Utah to use an additional bag of cement in the concrete mix, were sufficiently fulfilled by the Commission and the Commission could properly conclude in 1953 as well as on March 20, 1954, when payment therefore was made, that Utah had no further claim for this transaction respecting excessive fines, or the condition of the aggregates, or for additional general expense in connection therewith.
9. The statement for additional expense filed by Utah and dated July 19, 1956 in the amount of $109,356 [fol. 101] and described to be an additional cost incurred on account of the Commission's failure to furnish concrete aggregate that would meet contract specifications, was untimely filed and was an untimely presentation of a specific dollar claim.

DECISION

The appeal of the Utah Construction Company in the amount of $109,356 is denied and its claim rejected. Further, the motion of the Contracting Officer is granted to dismiss the appeal from the decision of the Contracting Officer for failure to make a timely presentation of its claim.

SAMUEL W. JENSCH
Presiding Officer

Issued:

October 1, 1959
Germantown, Maryland

[fol. 102]

PIER DRILLING APPEAL NO. 87

MEMORANDUM OF DECISION

IN THE MATTER OF THE APPEAL
OF
THE UTAH CONSTRUCTION COMPANY

UNDER CONTRACT NO. AT(10-1)-645

Docket No. 87

I hereby adopt the recommendation of the Advisory Board on Contract Appeals dated April 30, 1957, that this appeal be (1) remanded to the Contracting Officer for further consideration of the claim for increased costs due to the "float rock," issue, but not as to any costs attributable to the delay beyond the completion of the drilling and (2) be denied in all other respects.

/s/ R. W. COOK
Deputy General Manager

[fol. 103] /s/ H. M. Leppich

UNITED STATES ATOMIC ENERGY COMMISSION
ADVISORY BOARD ON CONTRACT APPEALS

IN THE MATTER OF THE APPEAL

OF

UTAH CONSTRUCTION COMPANY

UNDER CONTRACT No. AT(10-1)-645

Docket No. 87

FINDINGS OF FACT AND RECOMMENDATION

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[fol. 104]

UNITED STATES ATOMIC ENERGY COMMISSION ADVISORY BOARD ON CONTRACT APPEALS

Docket No. 87
(Pier Drilling)

IN THE MATTER OF THE APPEAL
OF
UTAH CONSTRUCTION COMPANY

UNDER CONTRACT NO. AT(10-1)-645

FINDINGS OF FACT AND RECOMMENDATION

JURISDICTION

The present appeal was taken by the Contractor, the Utah Construction Company, 101 Bush Street, San Francisco, California, the prime Contractors under Contract No. AT(10-1)-645 with the Atomic Energy Commission, on April 27, 1955, from decisions dated April 1, 1955, and April 19, 1955, by the Manager of the Idaho Operations Office and the Contracting Officer, Atomic Energy Commission, Idaho Falls, Idaho.

The appeal is in two parts—

(1) From the Contracting Officer's April 1, 1955, decision denying the Contractor's claim of February 18, 1955, for additional compensation in the amount of $17,734.63 for the drilling of material alleged to be "float rock," the existence of which the Contractor contended constituted changed conditions in the pier drilling contract within the meaning of Article IV—Changed Conditions of the Contract; and

(2) The Contracting Officer's decision of April 19, 1955, denying the Contractor's claim dated March 31, 1955, for additional compensation in the sum of $83,431.46 and a time extension of eleven months. The latter amount is to compensate the Contractor for alleged additional costs incurred by him as the result of the delay. The costs covered among other things expenditures for

winter protection, which costs allegedly would not have [fol. 105] been incurred had the drilling, unhampered by float rock, proceeded in accordance with the projected schedule of operations.

For purposes of simplification in this Findings of Fact and Recommendation, the term "Contractor" shall designate the Utah Construction Company, the term "Subcontractor" shall designate the George Casey Company of Los Angeles, California, and the term "Architect-Engineer" or "A-E" shall designate the Ralph M. Parsons Company, the Government's representative for conducting the inspection of the work performed under Contract AT(10-1)-645.

Article 15 of the General Provisions of the prime contract provides that:

> "*Disputes.* Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

The appeal was within the time provided and jurisdiction of the Advisory Board on Contract Appeals, United States Atomic Energy Commission, is clear.

PROCEDURE

An initial hearing in the matter was held in Conference Room "B", Atomic Energy Building, Idaho Falls, Idaho, on November 11, 1955. Although two other witnesses were called and testified, the initial hearing was held primarily to accommodate one of the Government witnesses, Mr. McDowell, who was available only on that occasion, being present in the room when the hearing on Docket 76 was taking place and being one of the witnesses on that other case. Mr. McDowell was due to leave for foreign lands at the termination of the hearings

[fol. 106] on November 11, 1955. The hearing was resumed in Room 59, Federal Office Building, Civic Center, San Francisco, California, on January 24, 1956, before Advisory Board members Edmund R. Purves and Robert Kingsley. Gardiner Johnson, Esquire, of the firm of Johnson and Stanton, San Francisco, California, and Peter Jacobson, Esquire, of San Francisco, California, appeared on behalf of the Contractor; W. L. Rowberry, Esquire, Attorney of Idaho Falls, Idaho, appeared on behalf of the Atomic Energy Commission. Mr. Purves acted as Chairman of the panel.

At the termination of the hearing both parties were requested to submit briefs.

The hearings were time-consuming and the files in this case are voluminous. In the opinion of the Board, both the time consumed and the material in the files are excessive inasmuch as the issue itself is relatively simple and the questions more or less factual. It appeared to the Board that much of the testimony was irrelevant. The Board must make mention of the fact that it was hampered by the absence of qualified expert witnesses.

BACKGROUND

The Utah Construction Company, prime Contractors for the construction of Assembly and Maintenance Area, Aircraft Propulsion Project, Contract AT(10-1)-645, USAEC National Reactor Testing Station, Idaho Falls, Idaho, included in its contract the drilling and excavation for piers or foundation shafts. The Subcontractor under the Contractor for this drilling and excavation was the George Casey Company of Los Angeles, California. However, the Contractor's claim is on behalf of itself. The hearings were not concerned with any dispute between the Contractor and its Subcontractor or any [fol. 107] relations between the two. The Contractor claimed that, in excavating for or drilling the shafts for the piers, conditions were encountered differing materially from those indicated on the contract documents and from the data furnished by those documents. The principal deviation from the furnished data is alleged to have been the existence of, and the encountering of, what is

spoken of throughout this issue as "float rock." This is a term not universally used in the construction industry throughout the United States. However, it does appear to be a term which is simply expressive in itself to describe a condition. This condition is the existence of individual stones or rocks of various sizes, detached from the principal bedrock by glacial or other geologic action, and subsequently covered by silt or other deposits so that the individual stones or rocks are suspended in the deposits below the surface of the ground. (When such stones or rocks have worked their way to the surface they are generally known as field stone.) However, it is possible for "float rock" to exist below the surface and, by reason of the absence of field stone on the surface of the ground, give no indication of its existence. It is also conceivable that core borings will fail to reveal the existence of "float rock." Float rock obviously presents difficulties in excavating and extracting the excavated material, especially when the excavation is confined to a series of holes of relatively small diameter. In such circumstances, float rock would present, to the excavator, a problem of extraction, comparable in difficulty with the excavating and extraction of solid rock. No indication of the existence of "float rock" was furnished to the Contractor. The Government may not have been aware of the existence of float rock, and we assume that it was not. [fol. 108] Lava contour maps were furnished showing the depth at which solid lava rock would be encountered as near as the depth could be ascertained from borings. Borings are admittedly an indifferent method at best, but the only method currently available. It developed at the hearing that bedrock was encountered in some places above the levels indicated on the drawings. The Contractor claimed that the Government withheld information and that the encountering of the "float rock" considerably delayed the excavation, to such an extent that the Contractor was forced into protecting the subsequent concrete work against the winter weather. The excavation was actually the form for the concrete piers to support the building. Delays were encountered which brought the actual pouring to the winter months with a consequent

risk of damage by freezing—a risk which the Contractor had to guard against and the cost for which guarding was not included in his original contract.

The Government claimed that the excavator did not use proper equipment and did not use what equipment he had properly and efficiently, in that: he used rotary rigs of a type suitable for straight earth digging on occasions when he should have used percussion rigs for rock digging; he did not organize the sequence of his work efficiently; his equipment was old and faulty; and the general operational problems, which included the traffic problems incident to the hauling away of excavated material, were not solved skillfully.

There were three bid item provisions pertaining to the method of payment for pier drilling—a lump sum price for bid items 3 and 4 (enclosure No. 1-A) was to include the cost of all pier drilling above the elevation 4747 feet; bid item 5 provided for linear foot prices for all unclassified excavation between 4747 feet and solid lava rock; bid item 6 provided for linear foot price for performing all solid rock excavation, the Government alleging that it had been assumed by both parties that no solid rock would be encountered above the 4747 foot level.

[fol. 109] By letter of June 1, 1953, the Contractor alleged sub-surface conditions materially different from those shown on the drawings and indicated and described in the specifications and ceased operations for pier drilling in accordance with Article 4 of the contract, which is as follows:

> "ARTICLE 4. *Changed Conditions*—Should the contractor encounter, or the Government discover, during the progress of the work sub-surface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before

they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions."

The Commission wrote the Contractor on June 2, 1953, directing it to proceed with the work. On the basis of its June 1, 1953, notice, the Contractor, by letter of February 18, 1955, and its enclosures, presented a claim for $17,934.63 for the increased cost of excavation resulting from encountering the "float rock." As noted, by its letter of March 31, 1955, the Contractor claimed an additional $83,431.46, as the increased costs of construction of the building resulting from the delays caused by the "float rock" problem.

DISCUSSION

For the reasons set out below, the Board concludes:

(1) That "float rock" was encountered and that this did constitute a "changed condition" within the meaning of Article 4;

(2) That this condition caused some delay in the drilling operations;

[fol. 110] (3) But that this delay did not operate to delay the building construction; and

(4) That no additional cost *to the Contractor* resulted from the "float rock" condition, except insofar as it is liable over to its subcontractor.

As in other cases that have come to the attention of the Board, we find here that the absence of qualified expert testimony on behalf of either party is not only a source of annoyance, in that the Board does not feel confident that all questions have been answered correctly from a technical point of view, but also we feel that the presence of expert witnesses would have served to expedite hearings. It seems to the Board that in this case the question as to whether or not the Contractor

encountered conditions unanticipated by anyone (assuming, as we do, that the Government was not privy to information which it did not afford the bidders) should have been relatively simple to determine. Such a determination did not require a parade of witnesses, some of whom threw little light on the issue before the Board. It is true that the Government produced two witnesses, Mr. West and Mr. McDowell, who though not technically trained, nevertheless possessed sufficient rudimentary experience to enable them to speak with a certain amount of familiarity on the situations encountered, or rather should have permitted them to do so had they not been so obviously partisan in their testimony. In addition to the question as to whether or not the conditions encountered might have been anticipated, there are the corollary questions as to whether or not the Contractor's operation was performed efficiently. Here we have only the off-the-cuff criticism of men who were not trained or experienced in the multitude of problems involved in excavating and in the disposing of the excavated materials, and in the other hampering physical conditions, but [fol. 111] also were unable to comment expertly on such questions as to whether or not the delays encountered or assumed were sufficient to force the Contractor into pouring concrete during winter conditions. The Board, therefore, has had to draw its own conclusions from the testimony of partisan witnesses who were not necessarily completely expert in those fields on which they were testifying.

It is recognized that much of the evidence in general in courts is circumstantial and from biased witnesses, but in this instance we are dealing with questions of fact and questions of scientific knowledge, which, if properly presented to the Board, would facilitate the work of the Board and expedite the settlement of the issues involved.

I

The basis issue around which this dispute revolves is whether or not the existence of what is termed "float rock" constituted an unforeseen and unknown condition causing delay within the meaning of Article 4. There

certainly would appear to be sufficient evidence that "float rock" was encountered. Whether or not this might have been foreseen is open to very little conjecture in the eyes of the Board.

On one of the estimated drawing (No. ANP-004-IDO-1) the diagram of the results of the core borings indicates the existence of gravel at approximately elevation 4732 feet. It is significant that the existence of gravel appears, insofar as the estimating drawings are concerned, in only one location. If this existence of gravel had been indicated in more than one location, then the bidder might have assumed that gravel existed in general throughout the area. If the Government had reason to imagine that gravel or "float rock" was prevalent throughout the area, then it was culpable in not having advised [fol. 112] the bidders of its belief. Test borings are inconclusive but they are our only present means of determining subsurface conditions. Presumably at some future date science will devise a method of accurately disclosing subsurface conditions throughout an entire given area. Test borings are essentially spot checks and obviously incomplete and inconclusive.

The Board is of the opinion that, following common practice and procedures and customary assumptions, the Contractor was well within its rights in estimating that the excavation would be simple and capable of being performed by rotary rigs until bedrock was struck.

The Board is intrigued by the theory (expressed in the Contracting Officer's Findings) that the term "gravel" can include "float rock." Although there appears to be a dictionary definition which would substantiate this assumption, we are sure that it would be a rare Contractor in any part of the United States who would think that gravel is anything other than an ingredient of concrete, the material for the foundation bed of a slab, or the material for a garden path—none of which would present serious difficulties in extracting from mother Earth.

The contract called for various types of estimates on excavation. Naturally, the excavation of simple earth costs the least per unit measure excavated. Unclassified

material would cost more than simple earth, and bedrock, naturally, would be the most expensive to excavate.

There is some question as to the classification in which "float rock" would fall. It is the opinion of the Board that "float rock" would be unclassified. It is obvious to anyone with any experience in digging, or to any farmer or rancher who has ever dug holes for fence posts, that digging proceeds with ease until stone is encountered. Digging with ordinary implements through solid rock is impossible and extracting loose stone from a post hole, [fol. 113] the stone being imbedded in the earth, is difficult with varying degrees. In any case, it is far more difficult and time-consuming than the excavating of earth. The difficulty increases with the size of stone encountered; and when the stone exceeds in diameter the diameter of the excavation the difficulty may be nearly as great as if a solid rock were encountered, and equally as difficult if the stone is of any appreciable depth. In fact, "float rock" (if the term "gravel" is used to describe it) could be of sufficient size as to constitute bedrock for all practical purposes.

The testimony is not clear as to the amount and kind of "float rock" encountered, but that it was encountered by the Contractor does not appear to have been successfully contradicted by the Government.

A considerable amount of testimony revolves around the Contractor's equipment and efficiency of planning with which it was employed. A rotary rig was obviously producing satisfactory enough results for straight digging, so the Contractor was faced with a dilemma, on encountering "float rock," of either switching rigs—percussion for rotary—(the former being adopted for rock drilling) or taking a chance that the "float rock" encountered was sufficiently small to be extracted with rotary rigs. Lacking devices which would give him the answer to the question as to the nature and size of stone encountered unexpectedly, the excavator has to resort to guess work. Naturally, his desire is to get the job done as quickly and as economically as possible. Certainly a contractor would not intentionally make inefficient use of the equipment at his disposal. We find that the selection of equipment was reasonable and proper.

[fol. 114] A second criticism of efficiency advanced by the Government concerns the maneuvering of equipment on the site and the sequence of drilling the several shafts as they were sunk, and the traffic problems incidental to the arriving, loading and departing of trucks. There was no evidence presented to convince the Board that the Contractor had not organized his work and carried out his part of the work in as satisfactory a method as was possible under the circumstances which prevailed. Again we find that the procedures used were reasonable and proper.

The Government claimed that, under General Condition II, it was incumbent upon the Contractor to satisfy himself as to the conditions encountered. However, manifestly a Contractor cannot satisfy himself as to subsurface conditions unless some information is given to him. He can only assume that conditions will be satisfactory and if he assumes they are unsatisfactory, then the latter assumption, when taken in competition with other bidders who have not made the assumption, are almost certain to insure that he will lose the award of the contract, especially in public bidding. The Board does not find the Government's position tenable on its insistence on a liberal interpretation of General Condition II. This is insisting on the Contractor's gambling extensively on the unknown. A good deal of testimony and time at the hearing was taken up with matters relating to the authorship, authenticity, and even whereabouts of certain charts and work records. It is not clear to the Board how these documents would assist in determining whether or not changed conditions had occurred, although they might have thrown some light on the amounts that might be due the Contractor, should the Contractor's claims for delay have been upheld.

It is worthy of note that bedrock was encountered in places at elevations higher than had been indicated or anticipated. This, while resulting in a saving to the [fol. 115] Government, does not reflect well on the accuracy of the information which the Government furnished to the bidders.

II

The Government claims the following:

"1. The concrete batch plant operated by the Contractor (Tr. p. 146) was not put into operation until May 26, 1953 (Tr. pp. 227-285), by which time over thirty pier holes had been drilled and were available for the pouring of concrete piers (Gov. Ex. I).

"2. The drilling of pier holes remained *substantially ahead of the* concrete pouring of piers until approximately the 29th of June (Gov. Ex. I), and the concrete pouring of piers was never delayed for lack of an available pier hole in which concrete could be poured (Tr. p. 121).

"3. At times pier holes were not filled with concrete for several working days after the drilling of those pier holes had been completed (Tr. pp. 124, 426), and there is evidence that drilled pier holes had to be re-excavated between the time the pier holes were first available for concrete pouring and the time the concrete was actually poured (Tr. pp. 123, 422, 423).

"4. The pouring of the concrete piers for the pool area was completed by July 3, 1953 (Tr. pp. 320, 321), but the concrete for the storage pool was not poured until approximately July 30, 1953, almost four weeks later (Tr. pp. 232, 233). This delay occurred as a result of a question concerning the quality of the concrete aggregate (Tr. pp. 249, 250).

"5. No concrete was poured on July 17, 18, 19 and 20, again due to the question concerning the quality of the concrete aggregate (Tr. pp. 253-255), and the concrete pouring operations were limited thereafter, allegedly for the same reason (Tr. pp. 260-270).

"6. All placement of concrete for piers had been completed by July 31, 1953 (Tr. p. 169; Encl. 7), but concrete pouring of the first wall for Building No. 607 did not commence until August 11, 1953

(Tr. pp. 245, 250) [although the forms had been placed three weeks prior to that time (Tr. p. 271)], due to the question concerning the quality of the concrete aggregate (Tr. p. 245), and the concrete pouring did not proceed steadily thereafter, but was delayed due to other interruptions unrelated to the pier drilling (Tr. p. 250).

"7. All placement of concrete for the piers was completed on July 31, 1953 (Tr. p. 169; Encl. 7), the date shown on the Contractor's May 13, 1953 Construction Status Chart, Building No. 607 (Govt. Exs. A, J-2) for the completion of the piers." (Govt. Brief, pp. 22-23).

[fol. 116] It appears from the record that serious questions arose as to the qualify of the Government furnished aggregate. This resulted in substantial delays while test samples were poured and tested and while revisions in the proportions of cement and aggregate were decided on. Since the piers in question were the foundation for the entire structure, obviously pouring could not proceed until these matters were settled. In the opinion of the Board, it was this dispute which delayed construction and not the drilling delays attributable to the "float rock." But the Contractor's claims in the present proceeding are founded on its original letter of June 1, 1953, which referred only to subsurface conditions. While the Board, as indicated at the hearing, construes this letter as sufficient to raise the "float rock" issue (although with less clarity than could be desired) it certainly presented nothing as to the aggregate. In fact, there is no indication that any claim based on the aggregate has been presented to the Contracting Officer. Under these circumstances, delays or expenses consequent upon the aggregate dispute are not before the Board in this proceeding.

III

It seems probable that the drilling problems incident to the discovery of "float rock" did cause increased expense to the drilling subcontarctor. But the present dispute is presented by the Contractor for its own account. Under

the cases, this presents a legal problem of some complexity. In *United States* v. *Blair*, 321 U. S. 720 (1944), the prime contractor was allowed to recover proven costs to a subcontractor, although there was no express proof that it was liable over. However, in *Severin* v. *United States*, 99 Ct.Cl. 435 (1943), cert. den. 322 U.S. 733 (1944), recovery by the prime contractor was refused where, by the subcontract, he was expressly relieved of liability over. [fol. 117] (See, also, *Warren Bros. Roads Co.* v. *United States*, 105 Fed. Supp. 826 (Ct. Cl. 1952)). As we read this series of cases, the prime contractor may recover against the Government if, but only if, it is liable over, but there is a presumption of such liability over where nothing to the contrary appears in the record.

However, in the instant case, the Contractor's Vice-President testified that, as of January 25, 1956, no formal claim had been made on it by the subcontractor (Tr. p. 366, lines 12-18), although there had been "a terrific amount of moaning about it" (Tr. p. 356, line 16). In this state of the record, the Board cannot determine whether liability over does or does not exist. If the Contractor resists liability over, or if the subcontractor is actually making no claim, or if such a claim is barred by the statute of limitations, there can be no recovery; but if there is liability over, then recovery is proper. But the record does not answer these questions, nor does it indicate the monetary extent of such liability, if any. While the Board could recommend a denial of relief for failure of proof, we think it better, in view of the Contracting Officer's absolute denial of the claim, to follow the practice of remanding for further inquiry by him in the light of this opinion.

FINDINGS OF FACT

1. Under date of March 31, 1955, the United States Atomic Energy Commission and the Utah Construction Company entered into Contract No. AT(10-1)-645, under which Utah undertook for a fixed price to construct the Assembly and Maintenance Area, Aircraft Propulsion Project, USAEC National Reactor Testing Station, Idaho Falls, Idaho, in Butte and Jefferson Counties.

[fol. 118] 2. The contract included the drilling or excavating of certain holes or shafts for piers and foundations, as called for in the specifications and as noted in the drawings.

3. The bidding documents called for the Contractor to include the excavation as a lump sum bid but permitted the Contractor to submit unit prices for the excavation of bedrock and for the excavation of unclassified material.

4. Certain data were furnished to the bidders to enable them to estimate the cost of excavation. These consisted of Drawing No. ANP-004-IDO-1 showing soil profile, and Drawing No. 902-2-3-4-ANL-U2 showing lava contour maps. The data furnished were in the customary form of data furnished and were seemingly adequate.

5. Utah, the prime Contractor, sublet the excavating to the George Casey Company of Los Angeles, California. However, this appeal is by the prime Contractor for itself.

6. After excavation was commenced loose rock was encountered below the surface at varying depths and prior to reaching bedrock. This loose rock is designated as "float rock" in this instance.

7. The Contractor was not required to carry the excavating to more than 2'0" into bedrock.

8. Encountered "float rock" does constitute an obstruction and the encounter is capable of causing delays—in that the removal of rock, loose or otherwise, is more difficult and time-consuming than the excavation of earth, sand or silt.

9. The Contractor exercised adequate skill and foresight in furnishing and maneuvering his excavating equipment and trucks.

[fol. 119] 10. The data furnished the bidders, while adequate, would not convey to the bidders the levels at which and the extent to which "float rock" would be encountered. The Contractor, therefore, did encounter changed conditions within the meaning of Article 4.

11. This changed condition caused some delay in the drilling and excavating operations; but, because of the delays caused by dispute over the quality of the aggregate, the drilling and excavating delays did not proxi-

mately cause delay in the construction of the building or in the final completion of the work.

12. It cannot be determined, on the present record, whether or not the changed condition above mentioned caused the Contractor any increased cost and the matter should be remanded for further inquiry on this point.

13. The Contractor is not entitled to any equitable adjustment in completion time on account of the changed condition referred to.

RECOMMENDATION

Accordingly, the Board recommends that the matter be remanded to the Contracting Officer for further consideration of the claim for increased cost due to the "float rock" issue, but, not as to any costs attributable to the delay beyond the completion of the drilling; and that, in all other respects, the appeal be denied.

Dated: April 30, 1957

ADVISORY BOARD ON CONTRACT APPEALS

/s/ EDMUND R. PURVES
EDMUND R. PURVES, Member

/s/ ROBERT KINGSLEY
ROBERT KINGSLEY, Member

[fol. 120]

In Reply Refer to:

OC:BB

April 1, 1955

Utah Construction Company
142 East Third South Street
Salt Lake City 10, Utah

Attention: Mr. George Putnam, Vice President

Subject: Your Feb. 18, 1955 Claim Entitled, "Changed Conditions Affecting Pier Drilling"—Contract AT(10-1)-645

Gentlemen:

We have received your February 18, 1955 letter, with enclosures, over the signature of your Mr. Glen Staker in which you make claim for additional compensation for alleged changed conditions encountered in pier drilling under subject contract. You state the changed conditions consist of the encountering of "float rock, not shown in the contract documents" the drilling of which "was every bit as costly and time consuming as drilling solid rock," and you submit a claim based upon computing all alleged float rock excavation at solid rock prices crediting a sum equalling the contract price for a similar quantity of unclassified excavation.

As you know, there were three bid item provisions concerning payment for pier drilling under subject contract. Your lump-sum price bid for Bid Item 1(f) was to include the cost of all pier drilling above the elevation of 4747 feet. Bid Item 5. provided for linear-foot prices for all unclassified excavation between elevation 4747 and solid lava rock. Bid Item 6. provided for a linear-foot price for performing all solid rock excavation (it being assumed by both parties that no solid rock would be encountered above the 4747-foot level referred to in Bid Item 1(f)). S1-03 of the technical specifications provided that shafts for foundation piers should be drilled a minimum of two feet into rock. In addition, upon discovery

that solid rock existed above the elevation of 4747 feet and the receipt of your June 1, 1953 letter noting this changed condition, an agreement was reached to pay Utah solid rock prices for any solid rock excavation required above the 4747-feet level. Further, Utah was advised by Leo A. Woodruff, AMP Resident Engineer, that the actual depth ordered to be drilled into bedrock was to be only two feet regardless of elevation at which encountered. We interpret his letter to Utah of June 26, 1953 as evidence of this understanding.

[fol. 121] The contract documents (see particularly Contract Drawing No. 902-2-3-4-ANP-U2) specifically indicated that unclassified excavation included gravel excavation. Gravel is commonly understood to include fragments of rock ranging in size from 2 mm. to a meter or more in diameter (see Webster's New International Dictionary, Second Edition, 1945, Unabridged). We have been unable to find any generally accepted definition for the term "float rock" (as used in your claim letter) which would differentiate it from the "gravel" classification. Therefore, we feel it is highly probable that much of the excavation which you classify as "float rock" excavation is in reality gravel excavation which you have contracted to excavate either for the lump-sum specified in Bid Item 1(f) or at the prices indicated in Bid Item 5.

Disregarding for the moment this conclusion based upon our interpretation of the specifications, and assuming (without conceding) for the sake of argument that the excavation of what you designate as float rock should not be regarded as unclassified excavation, there is yet a further reason why your claim for additional compensation must be denied.

Since the contract makes no special payment provision for "float rock" excavation as such, and we both agree that float rock is not to be regarded as solid rock (paragraph 3, your letter of February 18, 1955) any equitable adjustment would have to be measured by the excess costs for its removal.

I have determined and so find that only two types of rigs were used by Utah for pier drilling under the contract,

viz.: cable-type and rotary-type: further, that all solid rock excavation was performed by the cable-type equipment and therefore the linear-foot prices specified in Bid Item 6. must be regarded as the maximum allowable price for the use of this type equipment. I have further determined and so find that all unclassified excavation was performed by the rotary-type equipment and therefore the linear-foot prices specified in Bid Item 5. must be regarded as the maximum allowable price for the use of this equipment. I have further determined that all pier drilling down to solid rock was accomplished with the use of the rotary-type rig, and at no time were cable-type rigs used above the solid rock level.

Therefore even if, as assumed for the purposes above noted, "float rock" is to be distinguished from unclassified excavation, since identical excavation equipment was utilized for both types of material, it would appear that no excess costs were incurred which would entitle you to an equitable adjustment.

Under the circumstances it is my decision to deny the relief requested in your letter of February 18, 1955. This decision is to be regarded as final for the purposes of [fol. 122] appeal under the Disputes Article of the contract. A copy of the appeal procedures is enclosed herewith for your guidance should you wish to appeal the matter to the Commission's Advisory Board of Contract Appeals.

Very truly yours,

ALLAN C. JOHNSON, Manager
Idaho Operations Office

Enclosure:

Title 10—Code of Federal
Regulations

REGISTERED—RETURN RECEIPT REQUESTED

OC	OC	E&C	E&C	Mgr	M&R
WLRowberry:ns	BBoysen	FAHeasley	HMLeppich	ACJohnson	

4/1/55

[fol. 123] April 19, 1955

In Reply Refer To:
OC:WLR

Utah Construction Company
142 East Third South
Salt Lake City 10, Utah

Attention: Mr. George Putnam, Vice President

Subject: Your March 31, 1955 claim letter entitled, "Contract AT(10-1)-645 Changed Conditions Affecting Pier Drilling."

Gentlemen:

This is in response to your March 31, 1955 letter and the drawings referred to therein, over the signature of Mr. Glen Staker of your organization. The subject letter appears to supplement your February 18, 1955 claim letter on the same subject which dealt primarily with increased costs of pier drilling alleged to have resulted from changed conditions.

To some extent the allegations in your letter of March 31 overlap or duplicate those made in your February 18 claim letter. To that extent my decision of April 1 must be regarded as dispositive of any issue raised for the second time by the current letter. As a result, my decision of April 1 extends without further elaboration to the implication in your March 31 letter that percussion-type (cable-type) rigs were required to drill through the float rock (or gravel) encountered above bed rock levels and your reiteration that additional costs were incurred as a result.

In view of the determination in my decision of April 1, 1955, that no changed condition was in fact encountered from that described in the contract as bid upon, your request for time extension based upon the assumption of

REGISTERED—RETURN RECEIPT REQUESTED

having encountered a changed condition must necessarily be denied. Since the April 1 decision dealt essentially with your claim for additional costs and my decision by this letter is directed to your March 31 claim for additional time, it is appropriate to restate the finding and determination on the subject issue which will govern your right of appeal in the latter respect. Accordingly I have determined and so find that the encountering of a gravel condition which you have described as "float rock" does not constitute a changed condition within the meaning of Article 4 of the general provisions of the contract for the reasons advanced in my April 1, 1955 decision. Furthermore, the implication that percussion-type (cable-type) drills were required as a result of the float rock condition is contradicted by the facts determined in my previous decision that such rigs were utilized solely for [fol. 124] bed rock drilling and the rotary-type rigs were used for all other excavation without exception.

While your letter of March 31, 1955 makes general allegations of delay resulting from subsurface conditions described as changed conditions, no factual data is advanced to support the protracted delays alleged and your request for time extension therefor must be and hereby is denied. This denial of your claim for additional time necessarily extends to your claim for costs attributable to delayed performance alleged to amount in the aggregate to $83,431.46. This letter may therefore likewise be regarded as a final decision denying your claim for the additional compensation and time requested.

A copy of the Commission's appeal procedures is enclosed herewith for your guidance should you wish to appeal these decisions to the Commission's Advisory Board of Contract Appeals.

Very truly yours,

ALLAN C. JOHNSON, Manager
Idaho Operations Office
Contracting Officer

Enclosure:

Appeal Procedures

[fol. 125] /s/ H. M. Leppich

SHIELD WINDOW APPEAL No. 76

MEMORANDUM OF DECISION

IN THE MATTER OF THE APPEAL OF
THE UTAH CONSTRUCTION COMPANY
UNDER
CONTRACT No. AT (10-1)-645

DOCKET No. 76

I hereby adopt the recommendation of the Advisory Board on Contract Appeals dated July 23, 1957, that this appeal be (1) denied as to the claim for increased costs, (2) allowed as to the claim for an extension of time and (3) remanded to the Contracting Officer to determine the amount of additional time reasonably required to complete operations necessarily dependent upon the window installation which additional time shall be added to an extension hereby granted to November 2, 1954.

/s/ R. W. COOK
Deputy General Manager

[fol. 126]

UNITED STATES ATOMIC ENERGY COMMISSION ADVISORY BOARD ON CONTRACT APPEALS

IN THE MATTER OF THE
SHIELD WINDOW APPEAL

UTAH CONSTRUCTION COMPANY
Under
Contract No. AT(10-1)-645

DOCKET NO. 76

FINDINGS OF FACT AND RECOMMENDATION

EDMUND R. PURVES
1735 New York Avenue, N.W.
Washington 6, D. C.

ROBERT KINGSLEY
School of Law
University of Southern California
3518 University Avenue
Los Angeles, California

[fol. 127]

UNITED STATES ATOMIC ENERGY COMMISSION ADVISORY BOARD ON CONTRACT APPEALS

DOCKET NO. 76

IN THE MATTER OF THE

SHIELD WINDOW APPEAL
of
UTAH CONSTRUCTION COMPANY

Under Contract No. AT(10-1)-645

FINDINGS OF FACT AND RECOMMENDATION

JURISDICTION

The present appeal was taken by the Contractor, the Utah Construction Company, 100 Bush Street, San Francisco, California, price Contractor under Contract No. AT (10-1)-645 with the Atomic Energy Commission, on July 23, 1954, from a decision dated June 26, 1954, by the Manager of the Idaho Operations Office, Contracting Officer of the United States Atomic Energy Commission, Idaho Falls, Idaho. The appeal is from a decision by the Contracting Officer that changed conditions were not encountered by the Contractor within the meaning of Article 4 of the Contract as alleged by the Contractor. Article 4 of the Contract is as follows:

> "*Changed Conditions*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated on the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and specifications, the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon

promptly investigate the conditions, and if he finds that they do so materially differ the contract shall be modified to provide for any increase or decrease or cost and/or difference in time resulting from such conditions."

The prime contract was for the construction of the Assembly and Maintenance Area and the Administration Area of the Aircraft Nuclear Propulsion Project at the [fol. 128] USAEC National Reactor Testing Station, Idaho. The appeal specifically concerns difficulties encountered by the Contractor in assembling the shield or viewing windows in the hot shop of the above project. The Contractor alleged that the difficulties encountered were in fact changed conditions and conditions which materially altered the scope of the work it had originally contracted to perform.

For purposes of simplification in this Finding of Fact and Recommendation, the term "Utah" shall designate the Contractor, Utah Construction Company, and the term "Board" shall designate the panel of the AEC Advisory Board on Contract Appeals.

Article 15 of the General Provisions of the prime contract provides—

> "That all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer subject to written appeal by the Contractor within thirty (30) days to the head of the Department concerned or his duly authorized representative, whose decisions will be final and conclusive upon the parties thereto. In the meantime the Contractor shall proceed diligently with the work as directed."

That the appeal was within time and the jurisdiction of the Advisory Board on Contract Appeals, United States Atomic Energy Commission, is clear.

PROCEDURE

The matter was heard in conference room "B", Atomic Energy Building, Idaho Falls, Idaho, on Thursday, November 10, 1955. The hearing was commenced at 10:00

A.M. and proceeded throughout the morning of that day —the afternoon being given to the hearing on Docket No. 90. The hearing on Docket 76 was resumed on the morning of November 11, 1955 (after the members of the Board had had an opportunity to visit the site) and was continued through second and third days until adjournment at 2:30 P.M. on November 12, 1955.

Peter Jacobsen, Esquire, 100 Bush Street, San Francisco, California, and Gardiner Johnson, Esquire, 111 Sutter Street, San Francisco 4, California, appeared [fol. 129] on behalf of Utah. Bigelow Boysen, Esquire, Attorney of Idaho Falls, Idaho, appeared on behalf of the Atomic Energy Commission. At the termination of the hearing both parties were requested to submit briefs. Mr. Purves acted as Chairman of the panel of the Board.

Inasmuch as the matter concerned the assembly and installation of complicated devices, or collections of devices, designed to permit the viewing of operations in the hot shop without harm to the viewers, and inasmuch as the nature of the assemblage and installation was difficult to comprehend and fully understand from drawings and specifications, and especially inasmuch as the alleged difficulties encountered by Utah were of a nature that definitely required an intimate knowledge of the subject on the part of the members of the Board, the Board requested to view the actual installation.

The Board has heretofore directed correction of the transcript in sundry particulars. It has decided the appeal on the evidence produced at the hearing, on its inspection of the work, and on the briefs submitted.

The determination and findings of the Contracting Officer as outlined in his letter of June 26, 1954, to Utah consist of (1) a categorical denial of the existence of changed conditions, (2) a denial that, even if the allegations were established, they would constitute a basis for the modification of the contract under Article 4, (3) a reference to the lack of authority of verbal agreements, (4) a finding of responsibility of Utah with respect to the assemblage of the viewing devices, (5) an expression of opinion that the application of fundamental principles of mechanics and utilization of ordinary skill would have

resulted in the successful assemblage of the viewing devices, (6) a denial of the inadequacy of design of the windows, (7) a further denial of the inadequacy of the design, (8) a denial that the contract specifications were indefinite with respect to the viewing devices, (9) a [fol. 130] reference to a letter to Utah from the Ralph M. Parsons Company, the Commission's Contractor for design, which letter, according to the Government, contained no permission to Utah to fail to comply with the terms of the contract, (10) an allegation that Utah completed the assembly of certain of the shield windows prior to the written notification to the Commission and further stating that there are no changed conditions, and (11) a conclusion that Utah's reasons for suspension of operations were unwarranted and unauthorized.

BACKGROUND

The Utah Construction Company, the prime Contractor, entered into a contract with the Atomic Energy Commission on March 19, 1953, for the construction of Assembly and Maintenance Area and Administration Area at the Aircraft Nuclear Propulsion Project, USAEC National Reactor Testing Station in Idaho. As originally executed, the contract provided that the shield windows for the Hot Shop and Special Service Cublicle, in A&M Building No. 607, were to be furnished by the Government and installed by Utah in frames furnished by Utah. On June 29, 1953, the parties entered into Letter Order Modification No. 2. By its terms, Utah agreed to negotiate with a qualified manufacturer for the construction of the windows according to specifications thereafter to be provided by the Commission. Any agreement with such manufacturer was to be subject to the approval of the Commission. The order was terminable at the option of the Commission, in which event Utah was entitled to recoup its expenditures. The parties agreed to negotiate later over the price to be paid Utah. Whatever this remarkable document may have been, it clearly lacked both the definiteness and the mutuality required by law for a contract.

On August 5, 1953, pursuant to consent of the Commission expressed in letters dated July 20 and 24, 1953, Utah

entered into a contract with Corning Glass Works for the furnishing of the windows. On January 5, 1954, the parties entered into Modification No. 4 which was the [fol. 131] definitive Agreement contemplated by paragraph No. 7 of Letter Order Modification 2. Modification No. 4 was entered into as of June 29, 1953, and specified that Letter Order Modification No. 2 was superseded thereby. This latter modification purported —

> ". . . to provide that the Contractor shall assume the additional obligation to procure and assemble said windows, and shall furnish all plant, labor, equipment and materials, and perform all work necessary in accordance with final specifications and detailed drawings as referred to in procurement agreement dated August 5, 1953, between the Contractor and Corning Glass Works."

By the terms of the August 5, 1953, agreement, in consideration of the payment in the sum of $476,629, Corning was to furnish all shield windows, except those which are specifically designated on page 1 of the Agreement as follows:

> "1. WORK TO BE PERFORMED
>
> "The Subcontractor agrees to fully and completely perform all the work of—"Furnish all shield windows complete in accordance with purchase specifications MS-2-A and Division MS2, except shield window No. 6, Building No. 616, shield windows No. 1, No. 2 and No. 3, Building No. 609. In the event of any discrepancy between the above specifications, the provisions of Specification MS-2-A shall govern."

However, Utah agreed to perform the work required by Modification No. 4 for the sum of $592,495, and this last agreement would appear to be the final and only binding agreement.

It was required that shop drawings be submitted to the Architect-Engineer, Parsons and Company.

Certain change orders were issued by Utah to Corning—

1. Under date of August 27, 1953, concerning revisions of design which did not affect the contract price, and
2. Under date of September 16, 1953, which again did not affect the contract price.

Utah experienced trouble in assembling the windows on the site, and in a letter to the Commission, dated June 23, 1954, Utah referred to a meeting held on June 17, [fol. 132] 1954, at which all parties were represented and at which Utah disclaimed any expertness or previous experience in the assembling of the shield windows as specified. There had been some trouble having to do with defects in the glass and the reorientation of the glass within the frames, but the principal trouble concerned the distortion and slipping of gaskets. This distortion or slipping of the gaskets was a serious matter and obviously the windows would not have met with the specifications and in all probability would not have served their purpose and might even have been a source of danger had they been installed with distorted or slipped gaskets. The slipping of the gaskets occurred in the assembling of the windows. Utah blamed the slipping of the gaskets on faulty design and to substantiate its position cited trouble encountered by others on similar installations. Utah further charged that the specifications were inadequate and that there were faults in the glass itself (however these faults would not have necessarily of themselves contributed to the major difficulty encountered; namely, the slipping of the gaskets.)

Utah then said it had never encountered problems of this nature before and the rectification of the solution of problems encountered was beyond the scope of its contract and that, in effect, the troubles encountered constituted hidden conditions which materially altered the scope of its work. It therefore suspended work on June 16, 1954, and requested that the contract be modified to accommodate its situation.

On June 26, 1954, the Atomic Energy Commission made a categorical denial of the allegations as listed in the Findings under the heading of Procedure above.

Items 1, 2, and 3 of Modification No. 2 and Items 1 and 2 of Modification No. 4 are considered of sufficient importance to be included in the Background information.

Modification No. 2:

"1. Paragraph 6 of 'Schedule X' of Section II—Special Conditions, and all other drawings and specifications of Contract No. AT(10-1)-645 applicable and relating to the procurement, assembly and installation of the shield windows for the Hot Shop and Special Service Cubicle, A & M Building No. 609, [fol. 133] are hereby modified to provide that the Contractor shall assume the additional obligation to procure and assemble said windows, and shall furnish all plant, labor, equipment and materials, and perform all work necessary for the procuring, furnishing and assembling of said windows.

"2. The Commission agrees to exert its best efforts toward the development, completion and delivery to the Contractor, at the earliest possible date, final specifications and detailed drawings for said windows.

"3. The Contractor agrees, subject to terms and conditions contained herein, to undertake immediately, the performance of his obligations hereunder and to enter into early negotiations with a qualified manufacturer, the selection of whom shall be subject to the written approval of the Contracting Officer, leading to the manufacture of said shield windows."

Modification No. 4:

"1. Paragraph 6 of 'Schedule X' of Section II—Special Conditions, and all other drawings and specifications of Contract No. AT(10-1)-645 applicable and relating to the procurement, assembly and installation of the shield windows for the Hot Shop and Special Service Cubicle, A & M Building No. 607, are hereby modified to provide that the contractor shall assume the additional obligation to procure and assemble said windows, and shall furnish all plant,

labor, equipment and materials, and perform all work necessary for the procuring, furnishing and assembling of said windows in accordance with final specifications and detailed drawings as referred to in procurement agreement dated August 5, 1953 between the Contractor and Corning Glass Works."

"2. The Contract price, as specified by the contract as previously amended pursuant to Modifications Nos. 1 and 3 thereof, is, by virtue of this Modification No. 4, increased by the total amount of Five Hundred Ninety-two Thousand Four Hundred Ninety-five Dollars ($592,495.00), plus any necessary supervising engineer service by Corning Glass Works furnished and charged in accordance with the terms of its aforesaid procurement agreement with the Contractor."

A letter of June 28, 1954, from the Ralph M. Parsons Company, the Architect-Engineer for the project, to the U. S. Atomic Energy Commission referred to a request from the Government for comments on Utah's letter of June 23, 1954. The Architect-Engineer's letter of June 28, 1954 is quite strongly phrased and is, in effect, a statement that the Utah Construction Company was admittedly inexperienced (and by implication incompetent) to fulfill the contract as modified with respect to the assembly and installation of the shield windows. The letter chiefly concerns the gasket problem and states that in the Architect-Engineer's opinion proper assemblage of the [fol. 134] windows required only normal skill and ability. It elaborates further on how the job might have been done, and alleges that the job was not overly difficult and could have been performed by any reasonably competent contractor. However, Utah insisted on claiming that the Government should allow time extensions and equitable allowances for additional costs incurred by the alleged changed conditions. These conditions were (1) the lateral movement and distortion of the Koroseal gaskets under compression, (2) specifications which were too indefinite to determine whether glass submitted by Corning met those specifications, and (3) the use of selective assembly procedure in assembling the shield windows.

It was apparent to the members of the Board that sometime during the course of construction the matter of personalities entered into the picture.

During the course of the hearing, the former Contracting Officer, now the Manager, testified to the effect that the personnel assigned to the project by the Utah Construction Company, especially in the supervisory categories, was not of the highest calibre that could have been provided by Utah and by implication that the difficulties encountered stemmed from the incompetence of the supervisory personnel provided by Utah. However, there is no evidence that the Government ever made formal protest to the Utah Construction Company with respect to the calibre of the supervisory personnel prior to the time of the hearing; and the Board regards the aspersion as unfounded.

It was also brought out during the course of the hearing that a representative of the Parsons Company subsequently suffered nervous disturbances and by implication, therefore, this individual might not have been enjoying full competence during the progress of the work. Again such testimony is of a nature which distracts from the principal issues; namely, the difficulties encountered in assembling the shield windows and whether or not the plans, drawing and specifications were adequate to achieve the result contracted for, assuming competence on the part of Utah.

[fol. 135] There is no question but that difficulties were encountered by Utah in assembling and installing the windows. Utah contended that it was subjected to delays for which it was not responsible and that the delays were caused in part by the arbitrary actions of the Commission —unusual in the normal conduct of business—such as bypassing the prime contractor and, in part, by the actions of the Architect-Engineer and the vendor—Corning Glass Company.

The Commission contends the issue of delays was not properly before the Board and moved that all claims and factual issues based on changes or delays be dismissed. The Board denied the motion on the ground that it would be impossible for the Board to rule on such a motion at

that time, but the Board stated that it would take the motion under advisement and that the matter could be argued further in the briefs.

DISCUSSION

The shield windows around which this dispute revolves, are not windows in the ordinarily accepted sense of the term, but rather they are devices to permit observers to view the operations taking place within the Hot Shop without danger to the observers of being affected by radiation. They are in effect protective devices which, at the same time, must be capable of affording clear vision through a thick protective concrete partition.

Actually the windows, each and every one of them, are a series of tanks with glass slides, the tanks being fastened together in a master frame, installed in the concrete partition, the tanks being filled with certain liquids to eliminate refraction of light and to prevent passage of radioactive rays. They are a vital and integral part of the project and obviously call for workmanship of the highest order, not only in the manufacture of parts which go to make up the windows, but in the assembly of those parts. The assembly and installation is admittedly a difficult [fol. 136] and time-consuming operation and one in which, once installation is made and the building is in operation, it would be extremely difficult, if not impossible, to correct any faults of manufacture or installation. Any failure of the viewing windows probably would render the project valueless, or greatly impair its value to the country. Therefore, there is no question of the extraordinary importance of the proper manufacture, assembly and installation of the windows. The record indicates clearly that Utah signed a contract and subsequent modifications of the contract which required it finally to completely furnish and install the windows. The record would further indicate that Utah agreed to adhere to the plans and specifications and to produce the building as called for. One can only assume that a contractor knows what he is doing when he signs a contract; and certainly on an item as large as this and as important as this a contract is not likely to be signed in a casual way.

There was some discussion as to the status of Corning; namely, is Corning considered to be a subcontractor of Utah or a vendor? The position of Utah throughout was that of prime Contractor with the possible exception of its relationship to Corning. Corning was either a subcontractor or a vendor. The factual relationship with Corning was as peculiar as the legal status of Modification No. 2. While the procurement contract was nominally between Utah and Corning, yet, as has been noted, that contract was subject to the approval of the Commission and several of its terms were dictated by the Commission in the letters of July 20 and 24, 1953. Once the contract was signed, both Corning and the Commission proceeded to ignore Utah. Technical conferences over manufacturing problems, testing, and other activities took place without the presence of, or even notice to, Utah. It is clear that, while for formal reasons, the Commission had interposed Utah as a prime contractor, the Commission staff and Corning regarded the Commission and not Utah as the de facto contractor. Under these circumstances, Utah can hardly be responsible for Corning's delays.

[fol. 137] The Board is of the view that, while by the express terms of the Delay-Damages aritcle of the standard Government contract a constractor is liable for inexcusable delays of a subcontractor, it is not, in circumstances such as were here present, responsible for the delays of a vendor. The Board regards Corning, under the factual situation here created by the Commission, as having the status of vendor. In addition to the complete exclusion of Utah from all dealings after August 5, 1953, above noted, it will be remembered that both Modifications 2 and 4 required Utah to secure the windows, not by its own devices, but by the method of selecting an independent manufacturer. The Commission cannot require Utah thus to give up its own control, then exclude Utah from subsequent dealings, and still subject Utah to a responsibility for delays it was prevented from controlling.

Even if Corning had been a true subcontractor, the Board would have viewed Corning's delays as excusable. The shield windows herein involved were a new engineering concept, existing only on drafting boards. They posed engineering and scientific problems of the highest degree

of difficulty, most of which could be solved only by the trial and error method. Everyone appears to have proceeded with the utmost diligence to their solutions. The delays were clearly inherent in the work and excusable.

However, the Board is asked to determine whether or not changed conditions actually existed in the course of the contract within the meaning of Article 4 as alleged by Utah, and further whether or not Utah was completely unhampered in its execution of the contract. With respect to the latter it seems fairly obvious that Utah could not exercise much, if any, discretion with respect to the procurement of the materials for the windows, inasmuch as it appears that the Corning Glass Company is the only glass company competent to furnish the glass necessary for installation of this type. It is significant in this respect that meetings were held on the assembly of the windows and on matters related thereto which [fol. 138] included representatives of all parties with the exception of Utah. Just why the representative of a principal party was not permitted is beyond the understanding of the Board, and the exclusion was unjustified.

The Board is satisfied, however, that regardless of any possible lack of power on the part of Utah with respect to procurement, the materials furnished by Corning were the best and most suitable for the project that could be produced in the United States. In alleging changed conditions reference is made to the use of a so-called "Selective Assembly Process" by Utah. It is difficult for the Board to conceive that the use of the selective assembly system is of itself a changed condition. It simply meant that Utah was at liberty to rearrange the glass panels or to use other glass and it would appear to the Board that this is simply an amplification of Utah's powers and hardly constitutes a changed condition.

The allegation of being faced with circumstances over which it had no control insofar as assembly of the windows is concerned leads directly to the question of expertness and experience on the part of Utah. It is obvious that, in signing the contract, Utah believed itself to be competent to execute the work which it contracted to do and further that the Government was entitled to expert performance.

By subsequent modifications Utah undertook the complete job, but when it encountered difficulty it then claimed unforseen circumstances. These unforeseen circumstances seem to consist chiefly of the creeping distortion or slipping of the gaskets.

While it was manifestly the responsibility of Utah to overcome this difficulty, it is somewhat significant that Utah received no assistance, that it had been excluded from important meetings and that it was left to its own devices. Subsequently, the Architect-Engineer claimed it knew what was wrong and how the job should have been done. It appears to the Board that hindsight rather than foresight played a part in the Architect-Engineer's claim. It further appeared to the Board that the exercise of [fol. 139] patience, and more expert study by Utah, could have led to a solution of the gasket trouble as later suggested by the Architect-Engineer. It was equally apparent to the Board that a better spirit of cooperation and a more practical application of a spirit of cooperation might well have prevented the difficulties, or might well have been of considerable help in overcoming those difficulties.

With respect to the allegation that only reasonable skills were required for a satisfactory performance of the contract, it must be pointed out that the Corning Glass Company itself admitted that the manufacture, assembly and installation of the viewing windows was a relatively new field and that no one knew very much about it.

The reason for the gasket difficulty seems to have been explained plausibly by the Architect-Engineer. The Architect-Engineer's witness stated at the hearing that the Glyptol cement applied to the frames was not given sufficient time to dry and hence when the gaskets were laid on the Glyptol cement it acted as a lubricant rather than as an adhesive. This explanation is so simple that the Board cannot help wondering why it did not occur to Utah in the course of assembly and possibly it did so occur.

There was a trial assemblage, an experimental assemblage, of one of the windows made by Corning at its Harrodsburg, Kentucky, plant. This assemblage was attended by representatives of all interested parties (including in this one instance, Utah.) Presumably the test

assemblage was successful. However, the test assemblage may well have been held under atmospheric conditions dissimilar to those encountered at the site and it would seem to the Board that the proper place for an experimental assemblage, as difficult as it may have been, would have been at the site rather than a location some 2,000 miles from the site and under local conditions which might not have obtained at the actual site of construction. Again it is obvious to the Board that throughout there [fol. 140] appears to have been a lack of realization of practical factors affecting the installation, and this lack of appreciation is not solely attributable to Utah.

Under date of July 6, 1954, Utah wrote to the Government, referring to the Government's letter of June 6, 1954, and conferences held July 1 and 2, 1954, but expressing disagreement with the determination made at those meetings and with the Government's letter. The letter of July 6 of Utah includes certain statements which are of interest and which do pertain to the issue of experience and competence:

1. Utah states "It is our opinion that in conscientious prosecution of the work involved in the assembly and installation of the shield glass windows, we have encountered conditions, previously unknown and unforeseeable, which are rendering the performance of said work materially different from the manner in which we could reasonably expect to carry out said work."

(Admittedly, conditions were encountered which in a sense were previously unknown and unforeseeable in that the work at hand involved operations in which no one apparently had any great amount of experience. However, it would appear that at the time it signed the contract, Utah surely could have foreseen that it was entering into a relatively unknown field and should have made a statement at that time or have adjusted its estimate to meet contingencies. Although it can be admitted that Utah knew relatively little about the operation which it was engaging to undertake, it was equally doubtful if anyone else knew very much about it either.)

2. "It is possible that execution of the work in the manner previously contemplated and in strict adherence

to the design will be a practical impossibility." (This is an assumption which was not borne out subsequently by the fact that the windows were assembled successfully.)

3. "Under our experience to date, and utilizing capable supervision and mechanics of the highest skill available, we have found it a practical impossibility to complete [fol. 141] the assembly and installation of the shield windows in such a manner as to prevent slipping of the prescribed gaskets and consequent leakage of fluids (with the exception of the two No. 1 type windows which, as you advised us during the meeting, have now been satisfactorily assembled and installed.)" (Apparently it was found possible to complete the assembly and installation of the shield windows in a satisfactory manner subsequently.)

4. "We are not in a position to question the accuracy or adequacy of the design; but we must point out that after utilization of the best skills available we have found it impossible to carry out the shield glass assembly, in conformity with the design details heretofore furnished to us, particularly in respect to the No. 2 type windows which are greater dimensions than the No. 1 type windows whose installation has been completed. (This is an ambiguous statement starting off by asserting that they cannot question the accuracy and then they, by implication, proceed to do so.)

5. "We disagree with the statement contained in your letter of June 18, 1954, to the effect that determination of correct procedures is our responsibility. Modification No. 4 provides that the assembly of the windows is to be performed in accordance with certain specifications and drawings. In diligent adherence to the details furnished to us to date we have found it a practical impossibility of accomplishing the desired result." (Again this would appear to be a somewhat inconsistent statement and furthermore the Board interprets Modification No. 4 as giving Utah full responsibility which would, by implication, include the determination of correct procedures.)

The Board is somewhat at a loss to determine just what made Utah issue the ultimatum which it did and to admit defeat. It is understood that a degree of frustration could be attained after repreated failure, especially when

the Contracting Officer and the Architect-Engineer were not evidencing any desire to cooperate, but whether that [fol. 142] is true or not, it still does not relieve Utah, the prime Contractor, from the terms of its contract.

Utah makes reference to delays inflicted upon it which were beyond its control. In the matter of delays due to a variety of causes, all the subject of testimony, it appears that (1) inasmuch as the Board holds Corning in the light of a vendor, Utah cannot be held accountable for the delays of the vendor where, as here, the Commission elected to conduct its dealings directly with the vendor; (2) the Commission decided that a process known as the "Selective Assembly Process" should be employed which, while not a "changed *condition*," still was a change in the specifications of work which undoubtedly subjected Utah to additional burden and delay, regardless of whether or not had such a process not been employed an inferior result would have been obtained; (3) the design of the windows was subject to revision, sometimes of an extemporneous nature, a practice which naturally resulted in delays, although revision of design may well have resulted in an improved product or even have been necessary; (4) Utah argues that certain of the revisions were unnecessary but the Board is of the opinion that the issue of necessity of revision is debatable and indefinite and has little or no bearing on the fact that Utah was subjected to delays that were not of its making; (5) the Commission did delay Utah for some 75 days following the reported appearance of haze or cloudiness in the glass before the Commission allowed Utah to proceed with the assembly.

It does appear to the Board that the *modus operandi* on changes and shop drawings finally adopted was not calculated to assure a maximum expedition and that the matter of the arbitrary imposition of the selective assembly process without consent or approval of Utah did cause delays which were not attributable to Utah. The Government, however, moved that the claim for such delays be dismissed, basing its motion, which was made at the hearing, on the fact that such delays do not come within the meaning of Article 4 and further that claims for excusable delays and claims for adjustment in some and con- [fol. 143] sideration for contract changes must be pre-

sented to the Contracting Officer in accordance with requirements of Article 9, which was not done. While Utah's letters of claim cited only Article 4 (Changed Conditions), still the Contracting Officer was promptly advised of the facts sufficiently to bring into play the operation of Article 9 (Delay-Damages). While the Board has held that claims under Article 4 require special forms of notice, Article 9 requires only that the *facts* be brought to the attention of the Contracting Officer. And the Board has recently held (see Docket 96 involving this same Contractor) that where a claim meets this requirement, the Contracting Officer and the Board must grant relief if justified, even though Article 9 is not specifically invoked.

In substantiating its case against Utah the Government cites the Supreme Court decisions in *The Harriman*, 76 U.S. 161 (1889), and *Carnegie Steel Company* vs. *United States*, 240 U.S. 156 (1916). In the latter case, involving the matter of manufacturing 18-inch hard-faced armor plate in accordance with drawings and specifications which were part of the contract, the Court stated, at 165:

> "Ability to perform a contract is of its very essence . . . and a delay resulting from the absence of such ability . . . is not a cause extraneous to it (the contract) and independent of the engagements and exertions of the parties."

However, the Board finds that there is a distinct difference between that case and the circumstances surrounding Utah's appeal in this instance, inasmuch as the Carnegie Steel Company was left to its own devices to produce the armor plate and the Utah Construction Company, in the matter of the shield windows, was surrounded by modifications which left the actual determination of manufacture and assemblage in the hands of Corning, but required that Utah be responsible. In the Carnegie case, Carnegie was responsible only for its own manufacturing. In this instance Utah is held responsible for others' manufacturing and for the design of others and for the constructions of others for assemblage. Therefore, although [fol. 144] Utah signed a contract to furnish, supply, assemble and install certain shield windows, there was con-

siderable advice and guidance of others of such a nature as to possibly be construed as interference. This might have been a factor in the introduction of personalities into the issue, and may well have led to a situation on the site which was not conducive to expeditious prosecution of the work.

The Board cannot help sensing an atmosphere of evasion of responsibility all around. The Government, when it could not prescribe the solution of the problem, assigned the responsibility for the solution to its prime Contractor, Utah. It does appear to the Board that, with a little cooperation and mutual understanding, this entitre issue could have been avoided. Again the Board is struck by the significance of the meeting held at the Argonne National Laboratory project on February 10, 1954, at which determinations were made which may not have been of the utmost importance with respect to the specific questions here involved, but nevertheless were of concern to Utah and which, had it not been excluded from that meeting, might have helped it to improve its operating procedures.

The Board must conclude that the drawings and specifications were adequate; that Utah had been given as much information as anyone would be given naturally for the assembly and installation of devices in the manufacture and installation of which no one was experienced; that there is no reason for Utah to have anticipated the displacement of the gaskets; that Utah performed to the best of its ability; that it was furnished certain drawings showing assemblage of the windows; but that, although the difficulties encountered by Utah were unforeseeable—in other words, that there was no reason for Utah to have anticipated the difficulties which it actually encountered—nevertheless those difficulties did not constitute changed conditions. It was, however, subjected to delays that were not of its making.

It is well conceivable that the difficulties encountered by Utah arose in large part, if not in all, from its inexperience and from its workmanship. In other words, [fol. 145] the conclusion can be drawn that Utah simply did not know how to do the job. However, the Board is not convinced that anyone else knew how to do the job either, including Corning, the Architect-Engineer, or the

Government, prior to the knowledge painfully acquired on the job.

FINDINGS OF FACT

1. Under date of March 19, 1953, the United States Atomic Energy Commission and the Utah Construction Company entered into Contract No. AT(10-1)-645, under which Utah undertook for a fixed price to construct the Assembly and Maintenance Area and Administration Area at the Aircraft Nuclear Propulsion Project, USAEC, National Reactor Testing Station, Butte and Jefferson Counties, Idaho.

2. The contract, as modified by Modifications 2 and 4 included furnishing, assemblage and installation of certain shield windows.

3. The contract specifications called for satisfactory performance.

4. The specifications and drawings were as adequate as any drawings or specifications could be in light of the nature of the work involved, it being recognized that a relatively new and unknown field was being entered.

5. In the assembly of the windows Utah encountered certain difficulties, the chief of which was the sliding of the Koroseal gaskets.

6. Certain delays were encountered including—

(1) Delays incident to time consumed in the provision of approved drawings and specifications.
(2) Delays incident to the employment of the Selective Assembly process.
(3) Delays incident to the reorientation of glass slabs.
(4) Delays incident to the rejection of chipped glass.
(5) Delays incident to the overcoming of the slipping of the gaskets.
(6) Delays incident to the Government's objection to the reported mineral oil haze.

[fol. 146] 7. Utah exercised the best workmanship and ability which it was capable of producing.

8. The difficulties encountered might have been more readily overcome by anyone experienced in the assembly

of this particular type of window, but no such person appears to have existed.

9. Utah was not assisted materially in the overcoming of these difficulties by either the Architect-Engineer or the Government at the time the difficulties were encountered; however, it is recognized that the responsibility for satisfactory performance was exclusively that of Utah.

10. The difficulties encountered did not constitute changed conditions within the meaning of Article 4, nor do any of the delays alleged by Utah come within the scope of that article.

11. Utah contracted to produce a satisfactory job and the Government was entitled to expect a satisfactory job on the basis of the contract.

12. The delays encountered, as set forth in Finding No. 6, were due to unforeseeable causes beyond the control and without the fault or negligence of Utah and resulted in delay of completion for a period of time extending until after November 2, 1954.

RECOMMENDATIONS

The Board recommends that the appeal be denied insofar as claim for increased costs is concerned but that the appeal be allowed in the matter of an extension of time for excusable delay.

The extension should be until November 2, 1954, plus such additional period as was reasonably required to complete operations necessarily dependent upon the window installation; and the matter should be remanded to the Contracting Officer with directions to ascertain the extent of such additional period and thereafter to issue his order [fol. 147] extending the time for completion of Contract No. AT(10-1)-645 accordingly.

ADVISORY BOARD ON CONTRACT APPEALS
UNITED STATES ATOMIC ENERGY COMMISSION

By /s/ ROBERT KINGSLEY
ROBERT KINGSLEY, Member

By /s/ EDMUND R. PURVES
EDMUND R. PURVES, Member

July 23, 1957

[fol. 148]

In Reply Refer To
E&C:HN

June 26, 1954

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Utah Construction Company
142 East Third South Street
Salt Lake City, Utah

Attention: Mr. George Putnam
Vice President

Gentlemen:

We have received your letter of June 24, 1954, over the signature of Mr. Staker alleging that conditions have been encountered in connection with your assembly of shield windows under your Contract AT(10-1)-645, which constitute changed conditions within the meaning of Article 4 of that contract; that such conditions have materially altered the scope of the work, and have necessitated your suspension of all operations in connection with the assembly of the windows. Your letter also encloses a copy of your previous letter of June 23, 1954, to the Commission which, you state, sets forth these conditions in detail. You ask that the Commission determine the extent of the changed conditions alleged and make any necessary modifications to your contract.

DETERMINATION AND FINDINGS

1. After careful study and investigation of the matters raised in your letters of June 23 and 24, 1954, I have determined and so find that none of the allegations therein support the conclusion that your Company, as the Contractor, has encountered "during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawing or indicated in the specifications, or unknown conditions of an unusual na-

ture differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," as contemplated under Article 4 of the subject contract.

[fol. 149] 2. Additionally, and based on such study and investigation, I have determined that none of the matters alleged in your said letters of June 23 and 24, 1954, would, even if established, constitute any basis for modifying your contract under Article 4 thereof as requested. More specifically, I have made the following additional determinations and findings in response to particular allegations made in the letters referred to.

3. Any oral discussions prior to the effective date of Modification 4 to the subject contract, pertaining to the competency of Utah Construction Company in the line of assembling shield windows, are irrelevant to the rights and obligations of the contractual parties as they now exist under the terms of the written agreement between them. Contract paragraph GS-11 expressly states: "No verbal agreement or conversation with the Commission or the Contracting Officer either before or after the execution of the contract, shall affect or modify any of the terms or obligations herein contained."

4. The written Contract AT(10-1)-645, as amended, between Utah and the Government is the measure of Utah's responsibility to perform the purchase, assembly, and installation of the shield windows according to the design specifications despite any subsequent disclaimer by Utah to the contrary.

5. By the application of generally accepted fundamental principles of mechanics and the utilization of the ordinary skill of the appropriate crafts, the shield windows in question can be assembled as required by the contract specifications without rupture of the Amercoat membrane or other damage.

6. There is no basis for your contention that a serious question has arisen as to the adequacy of the design with respect to the Koroseal gaskets.

7. There is no inadequacy of design with respect to glass, steel plates or Amercoat membrane to which any failure of the gasket scale upon introduction of Zinc Bromide into the tank could be attributed.
8. The contract specifications are not so indefinite or non-definitive as to preclude a determination whether the glass purchased by Utah meets the contract specifications.
9. The letter to Utah from the Commission's Contractor. The Ralph M. Parsons Company, dated May 20, 1954, suggesting a procedure under which certain glass purchased by Utah and appearing on preliminary examination to fall below the contract specifications, might nevertheless be usable if installed in a less critical window location, cannot be construed to mean that the specifications in question are so indefinite as to preclude determining com-
[fol. 150] pliance of the glass therewith; nor did said letter waive the rights of the Commission under the purchase order agreement between Utah and Corning Glass Company (approved by the Commission) to ultimately reject (prior to final settlement thereunder) any glass failing to meet the specifications; nor did such letter alter any contractual rights Utah may have under its said purchase order agreement with Corning Glass Company, to reject any glass not meeting the required specifications if it should find such rejection necessary in meeting its contractual obligations to the Commission under Contract AT(10-1)-645, as amended.
10. Commission action favorable to Utah as requested in its letter of June 24, 1954, is unavailable to Utah for the additional reasons that (1) the alleged changed conditions were not left undisturbed pending written notification to and investigation by the Contracting Officer, as required by that Article, but, on the contrary, Utah completed the assembly of certain of the shield windows prior to any written notification to the Commission; and (2) all of the conditions which presently appertain to the work required to be performed by Utah under Modification

4 to the subject contract have remained unchanged, normal to, and inherent in that work since the date said Modification 4 was negotiated.

11. Any suspension of operations for the reasons outlined in your letters of June 23 or 24, 1954, is entirely unwarranted and unauthorized by Article 4 or any other provision of Contract AT(10-1)-645, as amended.

DECISION

On the basis of the foregoing determinations and findings, it is my decision to deny the relief requested in your letter of June 24, 1954, and this letter is to be regarded as formal notification to you of my decision.

Your attention is invited to the fact that should you elect to appeal this decision under Article 15 of the subject contract entitled "Disputes," neither such election nor the appeal itself will relieve you of the obligation expressed in that Article to diligently proceed in the meantime with the prosecution of the work. You are accordingly directed to proceed with the work as required under the contract.

Very truly yours,

ALLAN C. JOHNSON, Manager
Idaho Operations Office
Contracting Officer

cc: JWE Cont. File—645
B. BOYSEN
W. H. BRUMMETT
LEO A. WOODRUFF

cc: Glen Staker, Utah
Const. Co.—Site
Aetna Cas. & Ins. Co.

Encl: (1)

Copy of Rules Governing Procedures for Appeal to Advisory Board of Contract Appeals—USAEC

[fol. 151] /s/ H. M. Lippich

SHIELD DOOR APPEAL NO. 95

MEMORANDUM OF DECISION

IN THE MATTER OF THE APPEAL OF
THE UTAH CONSTRUCTION COMPANY
UNDER
CONTRACT NO. AT (10-1)-645
DOCKET NO. 95

I hereby adopt the recommendation of the Advisory Board on Contract Appeals dated April 25, 1957, that this appeal be (1) denied as to all matters except the claim for a time extension and (2) be remanded to the Contracting Officer for a decision of the claim for a time extension based upon specific findings of fact, subject to further appeal if desired.

/s/ R. W. COOK
Deputy General Manager

[fol. 152]

UNITED STATES ATOMIC ENERGY COMMISSION
ADVISORY BOARD ON CONTRACT APPEALS

IN THE MATTER OF THE APPEAL OF

UTAH CONSTRUCTION COMPANY
(Under Contract No. AT(10-1)-645)

Docket No. 95

FINDINGS OF FACT AND RECOMMENDATION

ROBERT KINGSLEY
3518 University Avenue
Los Angeles 7, California

EDMUND R. PURVES
1735 New York Avenue, N. W.
Washington 6, D.C.

[fol. 153]

UNITED STATES ATOMIC ENERGY COMMISSION ADVISORY BOARD ON CONTRACT APPEALS

DOCKET NO. 95

IN THE MATTER OF THE APPEAL OF

UTAH CONSTRUCTION COMPANY
Under Contract No. AT(10-1)-645

FINDINGS OF FACT AND RECOMMENDATION

JURISDICTION

The present appeal was taken by the Contractor, the Utah Construction Company, 100 Bush Street, San Francisco, California, prime Contractor under Contract No. AT)10-1)-645, for the Atomic Energy Commission, from a decision dated October 27, 1955, by the Manager of the Idaho Operations Office, Contracting Officer of the United States Atomic Energy Commission, Idaho Falls, Idaho.

The decision of the Contracting Officer was received by the Contractor on October 29, 1955; the notice of appeal was dated November 3, 1955, and was received by the Contracting Officer on November 7, 1955. The appeal was from a decision by the Contracting Officer that held extra work and delays were not incurred by reason of the fact that the Architect-Engineer had incorporated certain notes on vendor's shop drawings. These notes were claimed by the Contractor to constitute design data calling for additional work. The claim was based on Article 3 of the Contract, which reads:

> "ARTICLE 3. *Changes*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due, under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall

be modified in writing accordingly. * * * Any claim [fol. 154] for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided*, however, that the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representatives, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

Article 15 of the General Provisions of the prime contract provides:

"ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representatives, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

The appeal was within time and the jurisdiction of the Advisory Board on Contract Appeals, United States Atomic Energy Commission, is clear.

For purposes of simplification in these Findings of Fact and Recommendations, the term "Utah" shall designate the Contractor, the Utah Construction Company; the term "Standard" shall designate Utah's subcontractor, Standard Steel Corporation; and "Parsons" shall designate the Ralph M. Parsons Company, the Architect-Engineer for the above work.

PROCEDURE

I

The matter was heard at the School of Law, University of Southern California, on May 21, 1956. The hearing was commenced at 10:00 A.M. and proceeded throughout that day, adjourning at 5:00 P.M.

Peter Jacobsen, Esquire, 100 Bush Street, San Francisco, California, and Gardiner Johnson, Esquire, 111 Sutter Street, San Francisco, California, appeared on be- [fol. 155] half of Utah. Wilber Rowberry, Esquire, Attorney of Idaho Falls, Idaho, appeared on behalf of the Atomic Energy Commission. Edmund R. Purves acted as Chairman of the panel of the Board.

Due to a misunderstanding no reporter was present. It was therefore agreed, in the interest of time and due to the difficulties in reassembling all parties, including the members of the panel, that the hearing would be conducted without a reporter and that the briefs and exhibits would constitute the record.

The members of the panel had reviewed the installation on the site during the proceeding November and were familiar with the physical conditions of the finished structure and those items concerned in this dispute.

II

At the hearing, counsel for the Contracting Officer objected to the receipt in evidence of some of the documents included in the appeal record, compiled and transmitted by the Contracting Officer pursuant to Rule 3.13 of the Rules of Procedure governing appeals to this Board. The Board referred to its customary practice with reference to documents contained in the appeal record (subsequently stated formally in the Board's opinion in Appeal of Otis Williams and Company, Docket No. 88.) The Board ruled at the hearing that the inclusion of documents in the appeal record was tantamount to an offier into evidence by the Government and that only the Contractor could object at the hearing to their receipt.

On further reflection, the Board has concluded that this ruling was too broad. Rule 3.13 requires the Contracting Officer to include ". . . three copies of all correspondence, and other data relevant to the dispute." While [fol. 156] the punctuation is poor, we regard the words "relevant to the dispute" as modifying both "correspondence" and "other data."

It follows that inclusion of a document in the record compiled under Rule 3.13 is a representation by the Contracting Officer of relevancy and such representation is binding on him at the hearings. But, since relevancy is the *only* limitation on the Rule's otherwise all-inclusive direction, the Contracting Officer should be free to raise any other proper objection to the receipt of included material.

In the light of the Board's ultimate recommendation on this appeal, the error was not prejudicial to the Contracting Officer and we make no attempt now to revise the ruling as to the specific documents concerned.

BACKGROUND

The Utah Construction Company, prime Contractor, entered into a contract with the Atomic Energy Commission on the 19th of March, 1953, for the construction of the Assembly and Maintenance Area and Administration Area at the Aircraft Nuclear Propulsion Project, USAEC National Reactor Testing Station, Idaho. The contract, among other things, called for the furnishing and installation of the machinery and equipment necessary to operate two enormous shield doors of such dimensions and weight as require mechanical operation, it being obvious that the housing for the machinery and equipment would have to be adequate and appropriate. The present appeal concerns specifically the final location and refinement of design of certain machinery and other equipment necessary to operate shield doors No. 101 and No. 301.

The location of the foregoing machinery and equipment was roughly or vaguely indicated on the bidding documents. Subsequently the location was accurately shown in the proper location on the vendor's shop drawings.

[fol. 157] One of the bidding documents prepared by the Ralph M. Parsons Company, Architect-Engineers, Drawing No. 902-3-ANP-MS-225 entitled "Assembly and Maintenance Bldg. 607—Hot Shop—door 101—Cable and Sheave System," showed on a plan details of a "Motor and Speed Reducer." The companion Drawing No. 902-3-ANP-607-MS-227—Cable and Sheave System for Door 301, did not indicate the corresponding location of the Motor and Speed Reducer. These drawings are dated December 13, 1952. A note on the drawings refers the bidder to the specifications. The specifications are adequate, judging by customary practice. The specifications give accurate and complete descriptions of the necessary machinery and equipment. The machinery and equipment are, however, only sketchily indicated on the drawings and the original indications of location turned out to be erroneous in that the machinery and equipment could not have been installed in the positions roughly indicated on the drawings. Thus, although Utah was furnished with definitive information with respect to the equipment itself, it was given sketcy information with respect to the locations for specific installation and that sketchy information was fundamentally erroneous with respect to position.

During September, 1953, Utah's subcontractor, Standard Steel Corporation, submitted for approval its drawings No. 5325/C1-0 and 5325/C2-0, being the drive details for doors 101 and 301. It was on these drawings that Parsons made the corrections which relocated the positions of motors and reducers as originally indicated on the contract documents. In addition Parsons made necessary corrections to elevation details as the contract documents failed to depict accurately such obviously essential items as machinery pads and bolts. There were further notes on these drawings which called for the lowering of the motors to adequate bedding and even notes calling for the provision of bed and pillow block [fol. 158] supports necessary to take the imposed loads. That the contract documents were woefully deficient in affording adequate information for the housing and position of equipment was obvious. However, there is no question but that the specifications gave the Contractor an

accurate description of what he would be called upon to furnish and install, in the way of equipment. Standard subsequently furnished Drawing No. 5325/C2-0, in October, 1953, which shows the motor and reducer correctly relocated.

Downs Crane & Hoist Company, through Standard, submitted Drawing No. 810610, the shop drawing for the cable drive drums for the shield doors. Parsons made notes on these drawings calling for the grooving to be the full length on the drum assembly and noting that No. 40 carbon steel should be used for the gear teeth. Parsons made the corrections on the shop drawing.

DISCUSSION

An immediate question occurring to the Board from the evidence presented is why, if Parsons had the knowledge to show correctly the location of the machinery and equipment on Standard's shop drawings, did Parsons not exercise that same knowledge and skill on the bidding documents, and thus have avoided any misunderstanding and subsequent controversy.

There is no question but that the bidding documents with respect to the immediate problem were inadequate, although the specifications did indicate to the Contractor in sufficient detail the nature of the equipment it would have to house.

In submitting a firm bid on the bidding documents, Utah certainly gave assurance to the Government that it was satisfied with the adequacy of the contract documents. [fol. 159] In as important an item as the operating equipment for the tremendous doors (of sufficient height and width to permit entry of railroad cars and sufficient thickness and design to prevent the passage of radiation) the Government might well assume that Utah was in full possession of all facts necessary to enable it to submit a firm bid.

It is possible that Parsons, which was aware of its own deficiency in failing to produce a complete bidding document, was counting on correcting its services on shop drawings to be submitted subsequently. This is, however, not a recommended way for professional architects or

engineers to render services. The responsibility of adequate design was clearly that of Parsons and not of Utah. We are, however, concerned primarily as to whether or not the notations on the shop drawings made by Parsons did constitute an amendment to the original plans and specifications. The notes on Standard's drawings have to do with location and not with equipment.

I

Insofar as the appeal relates to the location or relocation of the machinery and equipment, the Board concludes that no "change," within the contemplation of Article 3, was involved.

Certainly, a contract should not be entered into which depends on the submission of, and dependence on, corrections or notations on shop drawings. It is generally assumed in the construction industry that bidding documents are comprehensive and conclusive. However, when a contractor submits a firm bid, the bid is based upon documents which the owner must assume are comprehensive and conclusive, otherwise the contractor would have raised objections. By the same token, a contractor should not submit a firm bid on documents which he questions as to completeness and adequacy. The Board [fol. 160] can only assume in this instance that Utah was satisfied with the bidding documents presented to it. When those documents proved to be incomplete, it was Utah's responsibility to supply the omitted details, and secure approval thereof from the Architect-Engineer. Since Utah did not do this, it cannot complain that Parsons did so. It must be noted that Utah, so far as appears, never suggested any alternative method of meeting an obvious need in connection with the location problem.

II

As above indicated, Parsons also, by notations on shop drawings, required grooving of the drums for their full length and imposed a specific carbon content for the steel used in the gear teeth. The Board is unable to find any

basis for these demands in the bidding documents; and, since they are not the sort of obvious need involved in the location issue, we regard them as "changes" within the meaning of Article 3.

The Government argues that, even if these were "changes," the appeal cannot be allowed (a) because the notations on the shop drawings, even if sufficiently "in writing," were not orders of the Contracting Officer, and (b) because the claim, not made until January 28, 1955, was, by over a year, too late in the light of the 10-day requirement of Article 3.

(1) The Board has had numerous occasions to consider the effect of the 10-day requirement in various contract clauses. We have held, consistently, that the Contracting Officer's discretion, under the final proviso of such articles, is not arbitrary but reviewable under the disputes clause. However, each case must stand on its own facts. In general it is true, as the Board has said in other opinions, that the primary purpose of early notice is to afford the Contracting Officer an opportunity to ascertain the facts while they are fresh, and that, therefore, if the facts can still be determined, a late claim should be de-
[fol. 161] cided on its merits. However, we have recognized an additional purpose in early filing of claims under the "Changed Condition" article—namely an opportunity to mitigate damage by deletion of, or changes in, the work required. On further reflection, we think the same principle is applicable to the "changes" article. Promptly advised that relief under this article will be sought, the Contracting Officer might well elect to rescind the order or to modify it. We do not, as we did not in connection with the "changed condition" article, foreclose the possibility that a case may arise where the Contracting Officer is on notice of a potential claim apart from a formal demand, or that a case might exist where the change obviously would have been ordered regardless of potential expense. But the present case seems to us to be one where the general rule and not some possible exception applies. The claim was too late and is barred.

(2) Our conclusion as to the effect of late filing makes it unnecessary for us to decide the issue—argued ex-

tensively in the briefs—as to whether or not an order of the Architect-Engineer can ever be regarded as the equivalent of a change order issued by the Contracting Officer. We expressly leave that issue open for a more appropriate case.

III

The Contractor contends, also, that it was caused serious delays, entitling it to an extension of time under Article 9 of the contract. While that article also contains a 10-day limit on filing claims, the situation is different from that under other articles with similar clauses. Of necessity, the delays complained of will always have occurred before a claim is made and the only purpose of early filing, therefore, is to insure an accurate factual determination. We think those facts can, in this case, still be determined.

[fol. 162] While the Contracting Officer's decision, here appealed from, denied "any and all relief" he does not refer to the claim for time extension and, indeed, seems to have overlooked the references thereto in the Contractor's letters. Under the circumstances, the Board feels that the matter should be remanded to him for the making of the specific findings of fact, on this issue, contemplated by Rule 3.10 (see Dockets No. 91 and 96 relating to this same Contractor and the same contract), and for the entry of a proper decision thereon.

FINDINGS OF FACT

1. Under date of March 19, 1953, the United States Atomic Energy Commission and the Utah Construction Company entered into Contract No. AT(10-1)-645, under which Utah undertook for a fixed price to construct the Assembly and Maintenance area and Administration area at the Aircraft Nuclear Propulsion Project, USAEC National Reactor Testing Station, Butte and Jefferson Counties, Idaho;

2. The contract called for the furnishing and installation of certain machinery and equipment necessary to operate doors 101 and 301;

3. The specifications described definitively and adequately the machinery and equipment necessary;

4. The drawings concerned with the subject failed to convey adequately to the Contractor the location, position and supporting details of the machinery and equipment necessary to operate the doors;

5. The shop drawings of the vendor to the General Contractor were corrected by notations made by the Architect-Engineer to give definite information with respect to the location of the machinery and equipment;

6. Utah had submitted a firm bid on the basis of the documents furnished to it and the Government was entitled to expect a satisfactory and complete job;

[fol. 163] 7. The notations referred to in Finding No. 5 and the actions of the Contractor pursuant thereto did not constitute "changes" within the meaning of Article 3 of the contract;

8. The Architect-Engineer also required, by notations on shop drawings, additional grooving on the cable drums and a particular carbon content in gear teeth;

9. The matters referred to in the Finding No. 8 were "changes" within the meaning of said Article 3;

10. Claim for adjustment of the changes referred to in Finding No. 9 was not made within the time specified in the contract and the refusal of the Contracting Officer to consider a late claim was proper;

11. Sundry acts of the Government are claimed to have entitled the Contractor to an extension of time under Article 9 of the contract; but the Contracting Officer has not made specific (or any) Findings of Fact as to such issue as required by Rule 3.10 of the Board's Rules of Procedure.

RECOMMENDATION

The Board recommends;

(1) That the appeal be denied as to all matters except the claim for a time extension; and

(2) That the matter be remanded to the Contracting Officer for the making of specific Findings of Fact as to

the claim for a time extension, and the issuance of a proper decision thereon, which decision shall be subject to a further appeal if desired.

Dated: April 25, 1957

ADVISORY BOARD ON CONTRACT APPEALS

/s/ EDMUND R. PURVES
EDMUND R. PURVES, Member

/s/ ROBERT KINGSLEY
ROBERT KINGSLEY, Member

[fol. 164]

UNITED STATES ATOMIC ENERGY COMMISSION
P.O. Box 1221
IDAHO FALLS, IDAHO

In Reply Refer To:

OC:WLR

October 27, 1955

Utah Construction Company
142 East 3rd South Street
Salt Lake City 10, Utah

Attention: Mr. W. J. Pollin

Subject: Shield Doors—Contract No. AT(10-1)-645

Gentlemen:

There has been presented to me for decision as Contracting Officer under Contract AT(10-1)-645, your claim for alleged extra work in connection with the shield doors installed in Building 607 under subject contract.

The record reveals that this claim was first presented to the Commission on January 28, 1955, in the form of a proposal for a change order for alleged extra work beyond the scope of the contract. The Contractor alleges that this extra work was brought about by the action of the Architect Engineer for subject contract incorporating additional design through correction of your vendor's shop drawings. By letter of March 2, 1955, the Commission allowed two and denied the remainder of the items composing your claim. By letter of October 6, 1955, the Contractor requested a review of its position on the remainder of the claim, presenting additional comments regarding each item and proposing that a change order be issued containing an adjustment of time and compensation for the alleged items of extra work.

AIR MAIL—SPECIAL DELIVERY
REGISTERED—RETURN RECEIPT REQUESTED

In making a decision relative to your claim the following two articles of the contract are pertinent:

> "Article 3. Changes.—The contracting officer may at any time, by a written order, . . . make changes in the drawings and/or specifications of this contract [fol. 165] and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: . . ."
>
> "Article 5. Extras.—Except as otherwise herein provided no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

Assuming, only for the purpose of discussion, that the contract drawing corrections made by the Archi'ect Engineer had, in fact, effected changes in or additions to the contract drawings or specifications (and this contention we deny), it is clear from subject contract that the Architect Engineer would have had no authority to order or authorize extra work or changes on behalf of the Commission.

The above-quoted articles make it clear that only the Contracting Officer can order extra work or a change in contract drawings or specifications. Article 5. is explicit that no charge will be allowed for extra work unless ordered in writing by the Contracting Officer and the price stated in such order. Article 3. only provides for an adjustment for changes ordered in writing by the Contracting Officer and even then any claim for adjustment must be made within ten days from the date the change is ordered.

The Architect Engineer's authority is limited to checking, approving or requiring revision of shop drawings to assure conformity with approved design and contract draw-

ings and specifications. The Contractor is not required or authorized to comply with the Architect Engineer's corrections of shop drawings which would change or add to the contract drawings or specifications without written direction to do so from the Contracting Officer. It is the function of the Architect Engineer to correct shop drawings to the extent deemed necessary to make the shop drawings (which serve to implement the contract drawings and specifications by detail) comply with the contract drawings and specifications. To the extent the Contractor deemed the corrections to go beyond this, the Contractor should have refused to comply with the corrections until some agreement was reached with the Contracting Officer concerning the adjustment to be made for complying with the correction considered by the Contractor to be a change or addition entitling it to an adjustment. Lacking any such agreement, the Contractor should have refused to comply unless such correction was ordered in writing by the Contracting Officer (which order would in this case have reserved the question of adjustment pending the submission under the Disputes Clause of the question whether such correction did, in fact, constitute such a change or addition).

[fol. 166] The fact that over a year elapsed between the time these corrected drawings were submitted to the Contractor and the Contractor first brought these corrections to the attention of the Contracting Officer in the form of a claim is indicative that the Contractor considered such corrections to be within the scope of the contract drawings and specifications. However, be this as it may, even had a change or extra work been properly ordered by the Contracting Officer, the lapse of over a year prior to the submission of a claim for equitable adjustment would, of itself, preclude your right to such an adjustment. It is true that Article 3. would, upon a proper showing and determination, allow the Contracting Officer to receive and consider and, with the approval of the head of the Department, adjust any change asserted prior to the date of final settlement of the contract. It is my conclusion, however, that the facts in this instance

do not justify the waiver of the ten-day period prescribed by Article 8.

The fact that none of the alleged changes or extra work was ordered in writing by the Contracting Officer and the fact that the Contractor waited for over a year to first draw these circumstances to the attention of the Contracting Officer and make a claim for adjusment requires me to conclude, and I so find, that Utah is not entitled to any adjustment for the alleged changes or extra work performed in conjunction with the shield door installation in Building 607 under subject contract, and any and all relief requested is hereby denied.

In addition to the above findings, I also find that none of the corrections of shop drawings identified by the Contractor resulted in any change in, or work additional to that required by, the contract drawings or specifications.

This decision is to be regarded as final for the purposes of appeal under the Disputes Article of subject contract. A copy of the appeals procedure is enclosed herewith for your guidance should you wish to appeal the decision to the U. S. Atomic Energy Commission Advisory Board of Contract Appeals.

Very truly yours,

ALLAN C. JOHNSON, Manager
Idaho Operations Office
Contracting Officer

Enclosure:

1. Rules of Procedure, USAEC
   Advisory Board of Contract Appeals

CC: Mr. Peter Jacobsen, General Counsel
Utah Construction Company
100 Bush Street
San Francisco 4, California (w/o encl)

[fol. 167]

IN THE UNITED STATES COURT OF CLAIMS

No. 3-61

• • • •

UTAH CONSTRUCTION AND MINING COMPANY

v.

THE UNITED STATES

Gardiner Johnson for plaintiff. *Thomas E. Stanton, Jr.*, and *Charles J. Heyler* of counsel.

Irving Jaffe, with whom was *Assistant Attorney General John W. Douglas*, for defendant. *James F. Merow* was on the briefs.

Before COWEN, *Chief Judge*, DURFEE, DAVIS, and COLLINS, *Judges*, and WHITAKER, *Senior Judge*.

OPINION ON DEFENDANT'S REQUEST FOR REVIEW OF COMMISSIONER'S ORDER—December 11, 1964

WHITAKER, *Senior Judge*, delivered the opinion of the court:

Plaintiff had a contract with the Atomic Energy Commission for the construction of an assembly and maintenance area at the National Reactor Testing Station in Jefferson and Butte Counties, Idaho. The contract was fully performed on January 7, 1955, several extensions of time having been granted on account of delays for which the contractor was not responsible. During the performance of the contract and after its completion, plaintiff made various claims for increased costs and for damages, some of which were claims arising under the contract and some for alleged breaches of contract by the defendant on account of delays and other causes.

[fol. 168] The case was referred to Trial Commissioner C. Murray Bernhardt for the taking of testimony and for

a report. On February 18, 1964, the commissioner issued an order defining the scope of the testimony to be taken with reference to the several claims, in the light of the Supreme Court's opinion in *United States* v. *Bianchi*, 373 U.S. 709 (1963). The defendant now asks us to review this order.

Prior to *United States* v. *Wunderlich*, 342 U.S. 98 (1951), this court had held that in determining whether or not the action of the contracting officer or the head of the department was arbitrary or capricious or unsupported by substantial evidence or otherwise contrary to law, it was not confined to the evidence before the Board of Contract Appeals (which in most cases was the representative of the head of the department), but was entitled to receive evidence *de novo*. However, the Supreme Court in *United States* v. *Wunderlich*, *supra*, held that we were bound by the action of the contracting officer on claims arising under the contract unless his action was fraudulent; that is to say, unless it amounted to conscious wrongdoing. Following this decision, the Congress enacted what is known as the Wunderlich Act, being the Act of May 11, 1954, 68 Stat. 81. This act in substance provided that the decision of the head of a department or his duly authorized representative or board "in a dispute involving a question arising under such contract * * * shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

Following the enactment of this statute, this court first held in *Wagner Whirler and Derrick Corp.* v. *United States*, 128 Ct. Cl. 382, 121 F. Supp. 664 (1954), that the Wunderlich Act was designed to restore the *status quo ante* the decision of the Supreme Court in *United States* v. *Wunderlich*, *supra*, but we did not decide in that case whether or not *de novo* evidence was admissible to determine whether the action of the board was arbitrary, etc. However, in *Volentine and Littleton* v. *United States*, 136 Ct. Cl. 638, 145 F. Supp. 952 (1956), we explicitly held that since the purpose of Congress was to restore the *status quo ante* and since the practice prior to the

Wunderlich decision had been to receive evidence *de novo*, [fol. 169] we would continue to do so. We reiterated this position in *Bianchi* v. *United States*, 144 Ct. Cl. 500, 169 F.Supp. 514 (1959), 157 Ct. Cl. 432 (1962); but the Supreme Court reversed and held that in the determination of this question we were confined to the evidence admitted before the board. *United States* v. *Bianchi*, 373 U.S. 709 (1963).

In cases where the administrative record was defective or inadequate, the Court had this to say:

> * * * *First*, there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action. *Second*, in situations where the court believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court could not stay its own proceedings pending some further action before the agency involved. Cf. *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202. Such a stay would certainly be justified where the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny, for it was clearly part of the legislative purpose to achieve uniformity in this respect. And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court. [373 U.S. 709, 717-18.]

Where the dispute "arises under the contract" the contracting officer and the head of the department have authority to decide questions of fact and the contract makes their decision thereon final and conclusive; but where the dispute involves an alleged breach of the contract, and the contractor seeks unliquidated damages therefor, neither the contracting officer nor the head of the department has jurisdiction to decide the dispute. *Miller, Inc.* v.

United States, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); *Langevin* v. *United States*, 100 Ct. Cl. 15 (1943); *B-W Construction Co.* v. *United States*, 101 Ct. Cl. 748 (1944); reversed in part on other grounds, *United States* v. *Beuttas, et al.*, 324 U.S. 768 (1944). If they undertake to do so—which they rarely do—neither their decision nor the findings of fact with reference thereto have any binding [fol. 170] effect. This necessarily follows because they are without authority to decide the dispute. It goes without saying that a decision of any court or other agency on a matter concerning which it has no jurisdiction has no binding effect whatsoever. *Steamship Co.* v. *Tugman*, 106 U.S. 118, 122 (1882); *Coyle* v. *Skirvin*, 124 F. 2d 934, 937 (10th Cir. 1942), and cases there cited. See also *Petition of Taffel*, 49 F.Supp. 109, 111 (S.D.N.Y. 1941).

Defendant contends that since the contract gives to the contracting officer and the head of the department authority to make findings of fact concerning *all* disputes, they have authority to make findings concerning a dispute over whether the contract had been breached. This contention cannot be sustained. The contract plainly limits their authority to make such findings to "disputes concerning questions of fact *arising under this contract.*" This means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract.

The Supreme Court's opinion in *Bianchi*, *supra*, restricting the evidence to be considered by this court to the record before the Appeals Board, is expressly limited to "matters within the scope of the disputes clause." At page 714 the Court said:

> Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract or that it is not governed by the quoted language in the Wunderlich Act. Thus the sole issue, as stated *supra*, p. 710, is whether the Court of Claims is limited to the administrative record with respect to that controversy or is free to take new evidence. * * *
>
> It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to

> a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history.

Finally, in conclusion, the Court said:

> * * * We hold only that in its consideration of matters within the scope of the "disputes" clause in the present case, the Court of Claims is confined to [fol. 171] review of the administrative record under the standards in the Wunderlich Act and may not receive new evidence. * * * [373 U.S. 709, 718.]

The opinion of the Supreme Court was thus restricted to "matters within the scope of the disputes clause." An action for breach of contract is not within the scope of this clause.

However, it may be that the contracting officer and the head of the department may find a fact relevant to the settlement of a dispute arising under the contract, which fact may also be relevant on the question of the right of the plaintiff to recover for breach of contract. What effect is to be given to such a finding?

Let it be noted that no statute gives the contracting officer and the head of the department, or his representative, authority to decide the rights of the parties to a Government contract; their authority is derived solely from the contract between the parties. *Langevin* v. *United States*, *supra*, at 30.

The contract in Article 15 provides that "all disputes concerning questions of fact *arising under this contract* shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto." (Emphasis added.) Thus, the board's authority is limited to disputes "concerning questions of fact *arising under this contract*." It is only such disputes which the contracting officer and the head of the department have jurisdiction to resolve and on which their findings of fact are final and conclusive. The par-

ties did not contract that *their findings of fact should be conclusive in suits for breach of contract.* In such suits the contract does not bind a judicial tribunal to accept their findings, although they may have been relevant to a dispute "arising under the contract."

Had plaintiff been permitted to submit the dispute over what it was claiming to a judicial tribunal established by Congress with authority to find the facts and decide the dispute, and it had done so, plaintiff, under the doctrine of collateral estoppel, would have been bound by the tribunal's findings, both in the cause of action submitted and in a later proceeding between the same parties on a [fol. 172] different cause of action. *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948). The reason for this rule is to save the time of the courts and to protect a litigant from having to relitigate an issue previously submitted to a judicial tribunal and decided by it.

But neither the contracting officer nor the head of the department, or his representative, is a judicial tribunal created by Act of Congress; they derive their authority solely from the contract between the parties, and their authority is limited by the terms of the contract. That contract authorizes them to make findings and to decide disputes "arising under the contract." It is only as to such disputes that their findings and decisions are made final and conclusive. It does not make them final and conclusive on a dispute over whether there has been a breach of the contract.

When a party submits his case to a judicial tribunal, he does so in light of the rule that its findings of fact are binding on him, not only in that litigation, but in all other litigation between the same parties. But this rule does not apply where a contract requires him to submit his claim, not to a judicial tribunal, but to a person designated by the contract; in such case he does so subject only to the terms of the contract, and the effect of the findings and decision of the designated person is that set out in the contract and no more.

So, when a party appeals to a judicial tribunal to determine whether the other party has breached the contract, it is not bound by a finding of a person only authorized

to decide disputes "arising under the contract," and it is entitled to ask the judicial tribunal to make its own findings and render its decision based on those findings. Since this is the first time that recourse has been had to a judicial tribunal, that tribunal not only may, but it is obligated, to make its own findings. Never before has the contractor "had his day in court."

For example: The contracting officer makes a change in the contract and the contractor asks for the increase in his cost as a result of the change and for an extension in time for the delay incident thereto. The contracting officer allows him a sum for the increase in cost and determines he has been delayed X days. The contractor thinks he has been delayed more than X days, but his only recourse is an appeal to the head of the department [fol. 173] whose decision is final because this is a dispute arising under the contract. In the absence of action which is arbitrary, etc., this is the end of the matter, so far as increased costs and extension of time are concerned, for all findings of fact of the contracting officer and head of the department in such disputes are final and conclusive.

But the contractor still thinks he has been delayed more than X days and he further thinks the delay was so unreasonable as to amount to a breach of contract, so he sues for damages for the breach. In such an action the findings of fact of the contracting officer are not final, because this is not a dispute "arising under the contract." It is only as to those disputes that the contract does make his findings final. In a suit for a breach because of an unreasonable delay, the court, in order to determine whether the delay was unreasonable and, hence, a breach of the contract, must determine the extent of the delay. In such a dispute the parties did not agree that the decisions of the contracting officer should be final and conclusive.

In any case we would so construe the contract between the parties, but in this case there is a compelling reason to strictly limit the contract to its precise terms. It is well known that anyone seeking a contract with the Government must be willing to agree to accept the con-

tract drawn by the Government; indeed, the advertisement for bids so stipulates. These contracts all contain this "disputes" clause, which makes the arbiter of the dispute in the first instance the contracting officer, who is the Government's servant and employee, and whose prime duty is to be diligent in the protection of the Government's interests and to require that the contractor strictly comply with the terms of the contract. The transition from such a role to that of an impartial arbiter in the settlement of a dispute between himself, or his representative, and the contractor would seem to be somewhat difficult. An appeal from the findings and decision of the contracting officer is allowed to the head of the department, but he, too, is an officer of the Government, the opposite contracting party. This is an additional and a cogent reason for limiting this provision of the contract to its precise terms. See *Langevin* v. *United States*, [fol. 174] *supra; B-W Construction Co.* v. *United States, supra;* and *Miller, Inc.* v. *United States, supra.*

The Atomic Energy Commission's Advisory Board of Contract Appeals in the *Appeal of Utah Construction Company* (Docket No. 91) recognized its lack of jurisdiction to decide or to make findings concerning damages for breach of contract. It said:

> It is clear, in the light of the Board's decision in Appeal of Claremont Construction Company (Docket No. 64), that, not only does the Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter "relating to" and not one "arising under" the contract. The Board has discussed this distinction at length in both that Claremont case and in Appeal of Frontier Drilling Company (Docket No. 74). The reasoning need not be repeated here. As to this issue, the appeal should be dismissed as not within the jurisdiction of the Board.

In conclusion, we hold that in a suit for breach of contract we are not bound by a finding of fact of the Board of Contract Appeals even though that finding is relevant to "a dispute arising under the contract."

With these general principles in mind, we proceed to consider the commissioner's order with respect to the several claims. The commissioner divides them into these six categories, (1) with respect to the pier drilling, (2) the concrete aggregate, (3) the shield windows, (4) the shield door, (5) the Amercoat paint, and finally, the delay damages claim.

1. *Pier Drilling Claim.*

Plaintiff claims that in the drilling and excavation for "piers," or foundation shafts for certain buildings, it encountered subsurface conditions differing materially from those indicated in the contract documents. First, it claimed additional compensation for the extra cost of drilling the "float rock" which it had encountered and which it claimed was not shown on the contract documents. This claim was denied by the contracting officer on the ground that no changed conditions had been encountered. The Advisory Board of Contract Appeals, the representative of the head of the Atomic Energy Commission, reversed and found that the float rock did constitute a changed condition but that no additional cost had been [fol. 175] incurred by plaintiff thereby unless it was liable therefor to its drilling subcontractor. The claim was remanded to the contracting officer to determine the amount of the increased cost of drilling.

Certain letters have been filed with the commissioner to indicate that plaintiff did not further prosecute its claim for increased cost and, hence, neither the contracting officer nor the board allowed plaintiff any sum therefor.

The commissioner holds plaintiff is not entitled to recover in this court therefor by reason of failure to exhaust its administrative remedy. The commissioner was correct in affirming the action of the board since this question was a dispute "arising under the contract."

Plaintiff also claims damages for delay by reason of the refusal of the contracting officer to modify the contract on account of the changed conditions encountered. Since this is an action for breach of contract, the parties are not bound by the decision of the board and may introduce evidence *de novo* concerning any unreasonable delay that may have been occasioned thereby.

In *United States* v. *Rice*, 317 U.S. 61 (1942), it was held that, where a contract was modified on account of changed conditions encountered, the contractor was entitled to increased costs and an extension of time, but not to damages incident to the delay. However, where the contracting officer delays unreasonably in modifying the contract, the contractor is entitled to recover damages for such part of the delay as was unreasonable. *McGraw & Co.* v. *United States*, 131 Ct. Cl. 501, 506, 130 F. Supp. 394 (1955), and cases cited. Here the contract was not modified until after completion of the work.

It is not apparent how this could have delayed plaintiff because plaintiff has failed to show that the changed conditions increased its costs, but if it was unreasonably delayed, plaintiff is entitled to recover for breach of contract.

2. *Concrete Aggregate Claim.*

The contract allowed the contracting officer to purchase concrete aggregate from the Government's supplies and the contractor did so. Early in the performance of the contract it was discovered that the concrete did not have [fol. 176] the required strength and that the dirty condition of the aggregate was responsible therefor. To supply the necessary strength, the contracting officer required plaintiff to add one sack of cement to each cubic yard of concrete mix during the time the Government was washing the concrete so as to bring it up to specification requirements. Plaintiff submitted to the contracting officer a claim for the extra cement used and was reimbursed therefor.

More than a year after the contract had been completed, plaintiff filed a claim for additional costs incurred because of the poor condition of the aggregate. The contracting officer was of the opinion that this additional claim of the plaintiff was one for breach of contract and, therefore, one which he had no authority to decide under the terms of the "disputes" article. He also thought the claim was untimely.

Plaintiff appealed to the head of the department. The Advisory Board of Contract Appeals dismissed the claim

for failure of the plaintiff to make timely presentation of it.

If this claim be one for breach of contract, as our commissioner supposes, we have jurisdiction to determine it and to receive evidence *de novo*.

However, assuming the claim is not for breach of contract, we cannot agree with the commissioner that the failure of the board to consider the case on its merits gives plaintiff the right to introduce evidence *de novo* in this court. If we decide the board should have considered the claim on its merits, we should suggest to the board that it consider it on the merits and suspend proceedings here until it has had a reasonable opportunity to do so.

3. *Shield Windows Claim.*

Under the original contract defendant undertook to furnish the shield windows to be installed in the building to be constructed, but by modifications 2 and 4 thereof, plaintiff was required to negotiate a contract with the Corning Glass Works for the procurement of these shield windows, which it did.[1] The windows were supposed to comply with contract specifications and with the shop drawings and samples. Plaintiff complains that defendant unreasonably delayed in approving the shop draw- [fol. 177] ings. It also says that the designated authority first approved the type II windows but that other agents of the defendant later rejected them and still later the defendant reversed its rejection and again approved them. It also alleges delay in connection with the approval of type I windows.

The plaintiff presented its claim on this item for a time extension for excusable delay and an equitable adjustment for increased costs under the Changed Conditions article of the contract. The commissioner states that he cannot determine from the record what part of the claim arises under the contract and what part of it is for damages for

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[1] These shield windows were designed to permit observation of what was going on within the atomic reactor without subjecting the observer to radioactive radiation.

delay; but he concludes that the basic issue is whether or not the plaintiff was unreasonably delayed by acts of the Government. As to such claim he properly says that the decision of the head of the department is not final and *de novo* evidence may be introduced in this court.

Defendant's contention that the filing of the claim for delay with the contracting officer under the Changed Conditions article forecloses plaintiff from bringing suit for damages for delay cannot be sustained. The contracting officer could only grant an extension of time for delay (*United States* v. *Rice, supra*); he could not award damages for unreasonable delay.

It appears that the board over a period of 3 days heard testimony with respect to this claim, including the claim for delays, and that the transcript of this testimony runs to 453 pages, and that many exhibits were filed; hence, the commissioner suggests that the parties might well agree to stand on this record, with permission to supplement it with respect to the delay claim to such extent as they think proper. Certainly the parties ought to desist from duplicating the administrative record but, insofar as the claim relates to damages for unreasonable delay, the parties are not foreclosed by it nor from supplementing it, if they wish.

4. *Shield Door Claim.*

This claim was presented under the Changes article of the contract under which the contractor asked for extra costs by reason of a change in the drawings and specifications. The contracting officer disallowed the claim be- [fol. 178] cause it was not presented within 10 days as required by Article 3 of the contract.

After completion of the work, final payment was made to the contractor and a release was signed by it from which it excepted certain claims, including this shield door claim. According to defendant's answer, which is not rebutted by plaintiff, it released the Government "from all claims arising under, in connection with or by virtue of the subject contract and all modifications thereto with the exception of the shield window claim, the pier drilling claim, and the shield door claim, the concrete

aggregate claim, and the sum of $5,606.39 which was withheld pending a decision in the Amercoat appeal." The claim presented to the contracting officer with respect to the shield door did not advance any claim for increased costs on account of delays. If the release signed by plaintiff reads as set out in the Government's answer, it must be said that the Government was thereby released from all claims not specifically excepted, whether arising under the contract or in breach of the contract. *United States* v. *William Cramp & Sons*, 206 U.S. 118 (1907); *Watts Construction Co.* v. *United States*, Ct. Cl. No. 351-61, decided May 10, 1963. The exception of "the shield door claim" must have referred to the claim presented to the contracting officer. As stated, that claim did not refer to damages for delay. Hence, the commissioner is correct in saying that any evidence with reference to damages for delay on account of the shield door is inadmissible, because foreclosed by the release.

As to the claim made for extra work on account of changes made in the shop drawings, this is a claim "arising under the contract" and was within the authority of the contracting officer to determine. The contracting officer disallowed the claim because it was not presented within 10 days as required by Article 3 of the contract. The board held that a part of plaintiff's claim for extra costs must be disallowed because it did not constitute changes under the Changes article, and as to that part which did constitute changes the board held that it was barred by the failure of the plaintiff to present its claim within the 10-day period. These decisions, both of the contracting officer and of the board, were within their province. There is no allegation of arbitrary and capri-[fol. 179] cious action and, hence, we have no jurisdiction to review the action of the board. It is, therefore, immaterial for the purposes of this motion that no record was made of the board's proceedings.

5. *The Amercoat Paint Claim.*

In the release signed by the plaintiff, according to the defendant's answer, it "excepted therefrom the sum of $5,606.39 which was withheld pending a decision in the

Amercoat appeal." This sum was subsequently paid plaintiff and, therefore, defendant has been relieved from all liability with respect to this Amercoat paint claim.

The commissioner's order of February 18, 1964, is amended accordingly.

Defendant's motion for partial summary judgment may be filed, but the same is overruled with leave to renew as to any matters contained therein not ruled upon in this opinion.

COWEN, *Chief Judge*, concurring in the result:

I concur with the majority and Judge Davis in rejecting the Government's sweeping contention that *de novo* evidence is inappropriate with respect to any factual question connected with the contract, regardless of the nature of the contractor's claim or the authority of the agency board or head of the department to decide the dispute to which such factual questions are related. For the reasons stated in both opinions, defendant's position, that the Disputes clause requires the administrative agency to make binding factual determinations on every question relating to the contract, is untenable.

It should be emphasized that we have before us only the review of a commissioner's order. Considering the stage in the trial at which the order was issued, the nature of the record before us, and the briefs of the parties, I do not believe that this case in its present posture presents the proper vehicle for laying down hard and fast rules to resolve all of the important issues urged upon us by the parties. As I understand, the major issue, which separates the views of the majority from those of Judge Davis, is the extent to which a finding made by an agency board on a claim for relief that can be granted under the terms of the contract will be binding in a subsequent court ac-
[fol. 180] tion for relief of the type which is not available under the terms of the contract, when the same factual question is again presented. I would reserve my decision until the facts and questions of law are adequately presented to the court at a stage in the proceedings where it can properly decide the matter.

I would also reserve decision as to the scope and effect of the Suspension of Work clause that was included in the contract in this case. Apparently both the contractor and the AEC Advisory Board on Contract Appeals considered that this clause has no application to any of the claims presented by the contractor. However, defendant argues that the Suspension of Work clause authorizes the contracting officer to pay the costs incurred by the contractor as a result of Government delays. A decision as to the application of that clause might have an important bearing on other questions to be decided in this case. However, as Judge Davis has pointed out, this case does not present that issue in its present posture.

With the foregoing preliminary statement, I concur in the result reached by the majority on the six claims covered by the trial commissioner's order.

DAVIS, *Judge*, concurring in part and dissenting in part:

1. I concur with the court in rejecting the Government's broad contention that the Disputes clause demands that *all* factual matters connected with the contract—whatever the nature of the claim—be tried and determined only by the agency board (or representative), with finality attaching to all those administrative factual findings which are adequately supported. That has never been the law during the long history of Disputes clauses. On the contrary, the finality of such findings has been recognized only when the board was considering a contractor's request under some contract provision (like the Changes, Changed Conditions, Termination for Default or for Convenience, or Suspension of Work articles) expressly authorizing the agency to grant an adjustment in price or other specific relief in defined circumstances. These alone are disputed questions "arising under" the contract. Exhaustion of the administrative remedy has not been required and finality has not been accorded where the facts relate to a type of claim, such as for a breach, [fol. 181] which the contract does not commit to agency determination. Those disputes are connected with, but do not arise under, the contract. The administrative board can give no relief under the contract, and therefore cannot finally decide the facts.

This was the accepted distinction before the Wunderlich Act of 1954, 68 Stat. 81, 41 U.S.C. §§ 321-22.[1] There is certainly no ground for saying that that enactment changed this segment of Government contract law. The same rules have continued to be followed since the passage of that statute, both by the administrative agencies and by this court, explicitly and tacitly.[2] As the court's

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[1] See *Phoenix Bridge Co.* v. *United States*, 85 Ct. Cl. 603, 629-30 (1937); *Plato* v. *United States*, 86 Ct. Cl. 665, 677-78 (1938); *Langevin* v. *United States*, 100 Ct. Cl. 15, 29-31 (1943); *Silberblatt & Lasker, Inc.* v. *United States*, 101 Ct. Cl. 54, 80-81 (1944); *Beuttas* v. *United States*, 101 Ct. Cl. 748, 767 *ff*, 771 (1944), *rev'd on other grounds*, 324 U.S. 768 (1945); *Holton, Seelye & Co.* v. *United States*, 106 Ct. Cl. 477, 500, 65 F. Supp. 903, 907 (1946); *Anthony P. Miller, Inc.* v. *United States*, 111 Ct. Cl. 252, 330, 77 F. Supp. 209, 212 (1948); *Hyde Park Clothes, Inc.* v. *United States*, 114 Ct. Cl. 424, 438, 84 F. Supp. 589, 592 (1949); *John A. Johnson Contracting Corp.* v. *United States*, 119 Ct. Cl. 707, 745, 98 F. Supp. 154, 156 (1951); *Continental Illinois Nat'l Bank* v. *United States*, 121 Ct. Cl. 203, 246, 101 F.Supp. 755, 759, *cert. denied*, 343 U.S. 963 (1952); *Potashnick* v. *United States*, 123 Ct. Cl. 197, 218-20, 105 F. Supp. 837, 839 (1952); *Continental Illinois Nat'l Bank* v. *United States*, 126 Ct. Cl. 631, 640-41, 115 F. Supp. 892, 897 (1953).

[2] I give only a relatively few samples. See, *e.g.*, *F. H. McGraw & Co.* v. *United States*, 131 Ct. Cl. 501, 506, 130 F. Supp. 394, 397 (1955); *John A. Johnson Contracting Corp.* v. *United States*, 132 Ct. Cl. 645, 652, 132 F. Supp. 698, 701 (1955); *Railroad Waterproofing Corp.* v. *United States*, 133 Ct. Cl. 911, 915-16, 137 F. Supp. 713, 715-16 (1956); *Peter Kiewit Sons Co.* v. *United States*, 138 Ct. Cl. 668, 151 F. Supp. 726 (1957); *Volentine & Littleton* v. *United States*, 144 Ct. Cl. 723, 726, 169 F. Supp. 263, 265 (1959); *Abbett Electric Corp.* v. *United States*, 142 Ct. Cl. 609, 613, 162 F. Supp. 772, 774 (1958); *A. S. Schulman Electric Co.* v. *United States*, 145 Ct. Cl. 399 (1959); *Snyder-Lynch Motors, Inc.* v. *United States*, 154 Ct. Cl. 476, 519, 292 F. 2d 907 (1961); *Helene Curtis Industries, Inc.* v. *United States*, Ct. Cl., No. 251-56, decided Feb. 6, 1963, slip op., pp. 53-54, 312 F. 2d 774; *W. H. Edwards Eng'r Corp.* v. *United States*, Ct. Cl., No. 218-59, decided April 5, 1963, slip op., p. 5; *Flippin Materials Co.* v. *United States*, Ct. Cl., No. 8-57 decided Jan. 11, 1963, slip op., p. 48, 312 F. 2d 408; *Ekco Products Co.* v. *United States*, Ct. Cl., No. 464-57, decided Jan. 11, 1963, 312 F. 2d 768; *Ideker Constr. Co.*, IBCA No. 124 (1957), 57-2 B.C.A. par. 1441, pp. 4845-46; *Norair Eng'r Corp.*, ASBCA No. 3527 (1957), 57-1 B.C.A. par. 1283; *Craig Instrument Corp.*, ASBCA No. 6385 (1960), 61-1 B.C.A. par. 2875; *Kenneth Holt*, IBCA No. 279 (1961), 61-1 B.C.A. par. 3060; *Motel Eng'r & Mfg. Corp.*, ASBCA No. 7490

opinion in the present case points out, the Supreme Court's opinion in *United States* v. *Carlo Bianchi & Co.*, [fol. 182] 373 U.S. 709 (June 3, 1963), did not remotely suggest that these long-established rules were wrong or should be changed. That decision dealt solely with a matter conceded to be within the scope of the Disputes clause.[3]

With this history of almost thirty years, it is far too late to try to interpret the Disputes clause anew, as if the question had emerged for the first time. The practice is too firmly rooted to be puffed aside by grammatical refinements and hortatory appeals to the "plain language" canon. The judicial, administrative, and practical construction of the clause is too entrenched for any but the strongest of assaults. We have been presented with no such overwhelming reason for making this drastic change in Government contract law at this time.

2. I disagree, however, with the majority's holding that well-supported factual findings, appropriately made by the board in deciding a dispute "arising under the contract," are not binding in a court trial of a cause of action which is outside the Disputes clause (*e.g.*, for breach, reformation, etc.). If the board has relevantly and appropriately decided a certain factual issue in connection with a claim under the Changes or Changed Conditions article, etc., and if that finding is adequately sustained by the administrative record, my view is that then the court should accept the finding in deciding the breach claim (or other claim not "arising under the contract"). There should be no *de novo* evidence and no *de novo* find-

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(1962), 1962 B.C.A. par. 3363, p. 17,308; *Allied Contractors, Inc.*, IBCA No. 265 (1962), 1962 B.C.A. par. 3501, pp. 17,864-65. The Advisory Board on Contract Appeals of the Atomic Energy Commission took the same position (see the court's opinion, *ante*). See, also, Spector, Is it "Bianchi's Ghost"—or "Much Ado About Nothing", 16 Admin. Law Rev. 265, 290-91 (1964).

[3] In the case at bar, the defendant does not rely on *Bianchi* to support its broad position. The Government's Supplementary Memorandum (p. 10) says, after quoting a sentence from the *Bianchi* opinion, 373 U.S. at 714, "Thus, *Bianchi* does not decide the scope of the standard disputes agreement in Government contracts, beyond the recognition that no argument was addressed to this question."

ing on that particular factual issue. Of course, court evidence and court findings would be entirely proper as to all factual questions, remaining in the court case, which have not been finally determined by the agency tribunal; only those particular facts which have been actually found, and which survive scrutiny under the Wunderlich Act, would be conclusive. And, of course, a board could not gratuitously exceed its mandate by wandering off and finding facts which are not a true part of, and [fol. 183] integral to, its determination under the substantive contract clause being applied.

This position, rather than the court's, seems to me required by the terms of the Disputes clause, the phrasing of the Wunderlich Act, the principle underlying the *Bianchi* decision, and the policy of collateral estoppel.[4] Once an issue of fact arises in a controversy under the contract and is decided by the agency, the text of the Disputes clause makes that decision, if supported, final and conclusive on the parties—not simply final and conclusive for a special purpose, but final and conclusive without qualification and without limitation. The statute, too, is framed in terms of the conclusiveness, without restriction, of any supportable factual decision by the board "in a dispute involving a question arising under such contract."[5] The wording of both the Act and the contract clause seem to grant finality to all factual findings properly made by the board in the course of resolving a dis-

[4] I know of no decision of this court which has addressed itself to this exact problem.

[5] 41 U.S.C. § 321 provides: "No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit not filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

41 U.S.C. § 322 provides: "No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

puted question under the contract—not merely to the board's findings on disputed issues of fact which themselves necessarily arise under the contract.

The *Bianchi* opinion articulates the basic rationale for accepting fully the Act and the clause as they are written —avoidance of "a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end" (373 U.S. at 717). This major underpinning of the *Bianchi* decision likewise supports the finality, in court, of all facts validly found by the board in the course of a determination under the contract. There is no need for a second hearing on an issue already tried and resolved.

[fol. 184] This is the same general policy which nourishes the doctrine of collateral estoppel. The court is reluctant, however, to apply that principle to these administrative findings because of the nature and genesis of the boards. The Wunderlich Act, as applied in *Bianchi*, should dispel these doubts. The Supreme Court made it plain that Congress intended the boards (and like administrative representatives) to be *the* fact-finders within their contract area of competence, just as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board are *the* fact-finders for other purposes. In the light of *Bianchi's* evaluation of the statutory policy, we should not squint to give a crabbed reading to the board's authority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations (in disputes under the contract) must be received, if valid, in the same way as those of other courts or of the independent administrative agencies. Under the more modern view, the findings of the latter, at least when acting in an adjudicatory capacity, are considered final, even in a suit not directly related to the administrative proceedings, unless there is some good reason for a new judicial inquiry into the same facts. See Davis, *Administrative Law* 566 (1951); *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622, 627 (C.A. 4, 1955). The only reasons the majority now offers for a judicial re-trial of factual questions already determined by valid board findings are the same policy considerations which Congress

and the Supreme Court have already discarded in the Wunderlich Act and the *Bianchi* opinion.

3. With respect to a *de novo* trial, my disposition of the six separate claims with which we have to deal would be as follows:

a. *Pier Drilling Claim:* The only aspect of this claim now before us, on the Government's request for review of the Commission's order, is the ruling that plaintiff can introduce *de novo* evidence on the issue of whether it was delayed into the winter (and thereby suffered damage) in the pouring of concrete. This alleged delay in pouring concrete was part of an administrative claim that plaintiff was entitled to relief, under Article 4 (Changed Conditions), for the difficulties met after it encountered "float rock." The Advisory Board could not grant mone-[fol. 185] tary compensation for this delay (*United States* v. *Rice*, 317 U.S. 61 (1942)), but under the express words of Article 4 the Board could allow an extension of time for performance. In refusing to give that relief, the Board specifically found that the delay due to the "float rock" did not operate to delay the building construction (*i.e.*, the pouring of concrete). Since this issue was then properly before the Board in the proceeding under Article 4, its finding of fact must be accepted (in my view) if adequately supported. There should be no *de novo* trial of this issue.

b. *Concrete Aggregate Claim:* I agree with the court on this part of the case. The Hearing Examiner never reached the merits of any claim and therefore decided nothing (on the merits) which would be binding here. If the present demand can correctly be deemed one for breach of contract, there should be a full trial. But if the demand properly comes under the contract, the Commissioner should decide whether or not the Hearing Examiner's ruling on the timeliness of the appeal is to be upheld. If so, the claim is at an end. If not, proceedings here should be suspended to allow the Atomic Energy Commission a reasonable opportunity to determine the merits of the claim. Like the court, I intimate no view as to the character of the claim (breach of contract vs. arising under the contract).

c. *Shield Window Claim:* Plaintiff sought both compensation and an extension of time under Article 4 (Changed Conditions) for this item—just as with the Pier Drilling Claim. Basing its decision on Articles 4 and 9 (Delays—Damages), the Advisory Board, after a full hearing, made findings on the very delay for which plaintiff now seeks compensation. Those findings were rightly part of the Board's determination whether or not to grant an extension of time—relief expressly authorized by Articles 4 and 9. As indicated above, these findings, to the extent sanctioned by the administrative record, should be held binding on this court, and *de novo* evidence (directed at the same factual issues) disallowed. If there are other factual issues not covered by the Board's supportable findings, *de novo* evidence should be permitted.
[fol. 186] d. *Shield Door Claim:* I agree with the court that plaintiff is barred by its release from now seeking delay damages on this demand.[6] The claim made administratively was plainly one under the Changes article (Article 3) and therefore within the Board's competence. I do not concur, however, with the court's disposition of this claim on the ground that there is no allegation of arbitrary or capricious action. This is a formal defect which can easily be cured by amendment. If plaintiff does so amend, I would let the Commissioner decide whether he can adequately review the Board's findings in the absence of the oral testimony, *e.g.*, on the basis of the papers and documentary evidence. If such a review would be insufficient, I would suspend proceedings to give the Atomic Energy Commission a chance to correct the record by reconstructing the previous hearing or by holding a new one (see *United States* v. *Carlo Bianchi & Co.*,

[6] Technically, the question of the release is not now before us on *defendant's* request for review since the Commissioner decided that point in favor of defendant. Plaintiff did not seek review. In the interests of speedy and orderly disposition of the litigation, however, it seems better to dispose of the issue now, rather than when the case comes before us on the merits or on a motion for partial summary judgment. By failing to appeal from the Commissioner's ruling, plaintiff can be deemed to have accepted at least that part of his decision. There is no suggestion in the briefs that plaintiff is preserving its position on that phase of the case.

supra, 373 U.S. at 717-18).[7] *Bianchi*, as I read it, precludes any *de novo* judicial trial where the claim is solely under the contract and there have been administrative findings on the merits.

e. *Amercoat Paint Claim:* I agree with the court. To the extent not released,[8] this claim has been paid.

f. *Delay-Damages Claim:* The Commissioner held that, aside from the matter of the release,[9] the plaintiff's general claim for delay damages tracked the separate individual claims and should follow their disposition. I agree with this conclusion (as presumably the court does, although the opinion does not mention this phase of the [fol. 187] case). The general delay damages claim appears to have no independent status of its own but is a recapitulation of the separate demands.

4. There are two types of *Bianchi*-related issues which this case does not present in its current posture: (a) The extent to which an administrative determination of factual questions directly related to the interpretation (rather than the application) of the contract provisions is binding in court;[10] and (b) the proper procedure where the contractor, without having pursued administrative remedies under the contract, sues for a breach, while the defendant contends that the claim *could* and *should* have been framed as a demand for administrative relief under some specific clause of the contract. Since *Bianchi*, the court has not decided these questions (and does not do so now), and I continue to reserve my position until the issues must be faced. *Cf. WPC Enterprises, Inc.* v. *United States*, Ct. Cl., No. 256-59, decided Oct. 11, 1963, slip op., p. 7, 323 F. 2d 874, 878.

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[7] If plaintiff refuses to participate in such renewed administrative proceedings, it should be held to have abandoned the claim. If the Atomic Energy Commission refuses, "the sanction of judgment for the contractor" is available (373 U.S. at 718).

[8] See footnote 6, *supra*.

[9] The defense of release is raised by the defendant's motion for partial summary judgment which appears to cover more than the six claims now before us.

[10] This is one aspect of the so-called "fact vs. law" question under the Wunderlich Act.

[fol. 188]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1965

UNITED STATES, PETITIONER

vs.

UTAH CONSTRUCTION AND MINING COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 10, 1965

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 9th, 1965.

/s/ Earl Warren
Chief Justice of the United States

Dated this 10th day of June, 1965.

[fol. 189]

SUPREME COURT OF THE UNITED STATES

No. 440, October Term, 1965

UNITED STATES, PETITIONER

v.

UTAH CONSTRUCTION AND MINING CO.

ORDER ALLOWING CERTIORARI—November 8, 1965.

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is placed on the summary calendar and is set for oral argument immediately following No. 439.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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